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No. 06-906

In The
# Supreme Court of the United States

CARLOS PRADILLA,

*Petitioner,*

v.

ALBERTO GONZALES, Attorney General of the United States; MICHAEL CHERTOFF, Secretary, United States Department of Homeland Security,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether following *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377 (2004) and its progeny, the categorical and modified categorical approach must be applied in determining the legal effect of a criminal conviction in all deportation proceedings before a United States Immigration Court, and not just in cases involving an aggravated felony, and whether the United States Court of Appeals for the Eleventh Circuit therefore erred in failing to apply such approaches in determining whether a conviction "relat[es] to a controlled substance" so as to render an alien deportable?

2. Whether, in cases in which the categorical and modified categorical approach is used, the burden of proof upon the government in proving that the criminal conviction constitutes a basis for removability is beyond a reasonable doubt or by clear, unequivocal, and convincing evidence?

## PARTIES TO THE PROCEEDINGS

The Petitioner is Carlos Pradilla, a national and citizen of Colombia who has lived in the United States for more than twenty years but now faces removal as a consequence of the lower court's decision. The Respondents are Alberto Gonzales, Attorney General of the United States, and Michael Chertoff, Secretary, United States Department of Homeland Security.

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## PETITION FOR WRIT OF CERTIORARI

Carlos Pradilla, by and through his undersigned counsel of record, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit, dated October 5, 2006, denying Mr. Pradilla's Petition for Rehearing, is not a reported decision and is at Appendix ("App.") 63-64. The Decision of the United States Court of Appeals for the Eleventh Circuit, dated July 5, 2006, denying Mr. Pradilla's appeal, is not reported, and is at App. 1-4. The Decision of the Board of Immigration Appeals, dated January 20, 2004, denying Mr. Pradilla's Appeal, is at App. 5-7. The Final Order of Dismissal of United States District Judge James Lawrence King, dated March 3, 2005, denying Mr. Pradilla's Petition for Writ of Habeas Corpus and adopting the Report and Recommendation of the Magistrate Judge, is not reported, and is at App. 8-9. The Report and Recommendation of Magistrate Judge J. J. O'Sullivan, dated February 17, 2005, recommending the denial of Mr. Pradilla's Petition for Writ of Habeas Corpus, is at App. 10-40. The Decision and Order of Immigration Judge K. G. Bradley, dated December 14, 2001, ordering Mr. Pradilla's deportation, is at App. 41-62.

## JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals was entered on July 5, 2006. App. 1-4, *infra*. A Petition for Rehearing was denied by the Eleventh Circuit on October 5, 2006. App. 63-64, *infra*. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18, Section 371 of the United States Code provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 8, Section 1182(a)(2)(A)(i)(II), of the United States Code, provides as follows:

> [A]ny alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or

a foreign country relating to a controlled substance (as defined in section 802 of title 21), is inadmissible.

## STATEMENT OF THE CASE

This case concerns Carlos Pradilla, a national and citizen of Colombia who has lived in the U.S. for more than twenty years. Mr. Pradilla was ordered deported from the U.S. in violation of his statutory rights, in that the Eleventh Circuit Court of Appeals and lower courts failed to follow Supreme Court precedent and apply the categorical and modified categorical approach in deciding whether his money laundering offense is related to controlled substances. To the contrary, the Eleventh Circuit and lower courts below either gave no rationale whatsoever, or more egregiously, explicitly held that Mr. Pradilla was ineligible for relief based on a crime for which he was charged but never convicted – thereby punishing him for a crime without a conviction.

The origins of the case arose in 1982, when a California grand jury issued a thirty-five indictment against twenty-two defendants in a narcotics and money laundering scheme. DE 5 (Exh. I).[1] Mr. Pradilla's name appeared in four counts. Count 1 alleged that nineteen defendants conspired to commit money laundering offenses in violation of 18 U.S.C. § 371, including causing financial institutions to fail to file currency transaction reports. DE 5 (Exh.

[1] "DE" denotes "District Court Docket Entry" and is followed by the docket number as entered by the District Court during proceedings below. "App." denotes pages in the Appendix attached to this Petition.

I) – Indictment, pp. 2-4. This Count identified 93 "overt acts" constituting the conspiracy, of which Mr. Pradilla was named in two such acts. DE 5 (Exh. I) – Indictment, pp. 15-16. Both overt acts alleged that Mr. Pradilla was in possession of $50,000 in currency, but neither suggested that he knew the funds were related to a narcotics conspiracy.[2] *Id.* Mr. Pradilla cooperated fully with the authorities and pled guilty to Count 1.

Counts 2, 3, and 4 of the Indictment alleged that Mr. Pradilla and certain other defendants engaged in conspiracies to possess and distribute narcotics and that they aided and abetted those crimes. DE 5 (Exh. I) – Indictment, pp. 19-27. Counts 2, 3, and 4 were dismissed by the U.S. Attorney, so no evidence was submitted by the government on those charges and Mr. Pradilla was never convicted of those offenses. DE 5 (Exh. I) – Plea Agreement; Plea Hearing Tr.; Judgment and Sentence.

During the plea hearing, the prosecutor summarized the case against Mr. Pradilla. He noted that "other members of the conspiracy" had access to large amounts of currency, derived from the sale of cocaine, and that Mr. Pradilla's narrow role was *to deliver the currency to a financial institution, knowing that the institution was going to violate federal reporting laws*. DE 5 (Exh. I) – Plea Hearing Tr., pp.5-6. Nothing in the prosecutor's proffer asserted that Mr. Pradilla knew that the funds were illegally obtained, much less that they came from the sale of controlled substances. In light of Mr. Pradilla's cooperation and

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[2] By comparison, nearly a dozen overt acts in that Count reference a deposit of more than $1 million, and more than 40 acts reference a deposit of over $100,000.

minor role in the conspiracy, the Judge sentenced him to three years' probation and a $1,000 fine – penalties not typically commensurate with a drug trafficking-related offense. DE 5 (Exh. I) – Judgment of Conviction; Plea Agreement.

The legacy Immigration and Naturalization Service, now the Department of Homeland Security (the "DHS"), brought immigration charges against Mr. Pradilla in 1992. Based on the money laundering conviction, the DHS argued that Mr. Pradilla was deportable because: (i) after entry, he was convicted of a crime relating to a controlled substance; (ii) at the time of entry, he was excludable as a person whom the consular or immigration officer knew or had reason to believe that he was an illicit trafficker in a controlled substance; and (iii) he remained in the U.S. without permission after the expiration of his visa. DE 5 (Exh. D). *The first two charges were soon thereafter dropped by the DHS, leaving only the visa-overstay charge outstanding.*

The immigration court proceedings culminated in a 2001 decision by the Immigration Judge (the "IJ"). DE 5 (Exh. N), App. 41-62. The IJ ordered Mr. Pradilla removed from the U.S., holding *inter alia* that he was deportable on the basis of all three charges, even – oddly enough – the two which were withdrawn by the DHS; and Mr. Pradilla was not eligible for an inadmissibility waiver because his conviction related to a controlled substance offense.[3] *Id.*

[3] The legal context for this case is actually quite nuanced and complex. The Petitioner conceded that he was removable on the basis of his visa overstay. He nonetheless filed for a labor certification as an agronomist, and that application was approved by the Department of Labor in 1996. App. 16. Based on that certification, the Petitioner

(Continued on following page)

The IJ failed to apply the categorical or modified categorical approach in the course of his decision. The IJ based his conclusion that Mr. Pradilla's crime was related to a controlled substance on the fact that "Count 3" of the Indictment – a Count for which Mr. Pradilla was charged but *never convicted* – alleged that he was involved in drug trafficking activities. App. 54. The sole legal authority relied upon by the IJ was a fifty-year old case, *Matter of N-*, 6 I&N Dec. 557 (BIA A.G. 1955). App. 54-55.

Mr. Pradilla timely appealed the IJ's decision to the Board of Immigration Appeals ("BIA"), raising all of the arguments in his deportation proceedings. DE 5 (Exh. O), App. 5. In 2004, the BIA dismissed the appeal in part and sustained it in part. App. 5-7. The IJ erred in finding Mr. Pradilla deportable under the two OSC charges that had been withdrawn by the government, but the BIA sustained

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applied for permanent residency (i.e., adjustment of status), and submitted a motion seeking conditional termination of the deportation proceedings while the application was pending, as well as suspension of deportation. *Id.* To be eligible for adjustment of status, the INA required that the Petitioner be "admissible" to the U.S., because the law deems an adjustment applicant to be akin to a person seeking admission to the U.S. *See* 8 U.S.C. § 1255(a). Admissibility is governed by Title 8, Section 1182, of the United States Code, and one provision therein – Section 1182(a)(2)(A)(i)(II) – is the critical text in the instant Petition.

Ironically, then, if the Petitioner were ultimately removed as an overstay, it will not be because of the application of 8 U.S.C. § 1227(a)(2)(B)(i), of the United States Code, which provides for removal if a person's conviction relates to a controlled substance; *the government dismissed that charge*. Yet that same language appears in 8 U.S.C. § 1182(a)(2)(A)(i)(II), and if the Petitioner were removed for overstaying his visa, it would be because his conviction relates to a controlled substance and renders him ineligible for relief from removal (via an adjustment of status). The Petitioner would *de facto* be removed because of a charge dismissed by the DHS.

Mr. Pradilla's deportation on the visa-overstay charge. *Id.* The BIA also held that Mr. Pradilla was ineligible for an inadmissibility waiver, adjustment of status, and suspension of deportation, in that his conviction related to a controlled substance. App. 6-7. The BIA failed to apply the categorical or modified categorical approach in that decision, and did not provide any reasoning as to why the IJ was correct regarding the controlled substance determination.

In February 2004, Mr. Pradilla timely filed a habeas petition and Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Southern District of Florida. DE 1. In a two-page order in 2005, the District Court adopted the conclusions and reasoning of a Magistrate Judge and dismissed the complaint. DE 41, App. 8-9. Like the IJ and BIA, the Magistrate did not apply the categorical or modified categorical approach in holding that Mr. Pradilla's money laundering offense was "related" to a controlled substance offense. App. 31-34. Like the IJ, the Magistrate based that holding on "other counts of the indictment," App. 34, though Mr. Pradilla was *never convicted* of any other charges and there was no proof that he had knowledge that the relevant funds were drug-related.

Mr. Pradilla then filed a timely appeal of the District Court decision. DE 44. A three-member panel of the Eleventh Circuit Court of Appeals decided, in a decision dated July 5, 2006, to dismiss the appeal. App. 1-4. The decision devoted three pages to the standing of the case – a matter which neither the DHS nor Mr. Pradilla disagreed upon – and dealt with the merits in one sentence; the panel wrote, "Turning to the merits . . . , . . . the petition is without merit for reasons fully discussed at oral

argument." App. 4. (emphasis added). Counsel requested a transcript of the oral argument, but pursuant to Rule 34-4(g) of the Eleventh Circuit Rules, that request was denied. Counsel believes that the panel did not state at oral argument why the appeal would be denied, or even state that that was to be its decision. The only conceivable basis for a dismissal is that Mr. Pradilla is ineligible for a waiver because his conviction "relate[s] to a controlled substance offense."

Mr. Pradilla filed a Petition for Panel Rehearing or Rehearing En Banc with the Eleventh Circuit on August 17, 2006. In a decision dated October 5, 2006, the Eleventh Circuit denied the Petition without discussing the merits of the case, App. 63-64, prompting the instant Petition for writ of *certiorari*.

## REASONS FOR GRANTING THE PETITION

This Court has determined that the "categorical" or "modified categorical" approach must be used in determining whether a crime committed by an alien is a deportable offense. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S.Ct. 377, 381 (2004) (looking to "the elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime"); *Shepard v. United States,* 544 U.S. 13, 125 S.Ct. 1254 (2005); *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143 (1990). The panel of the Eleventh Circuit below failed entirely to consider or apply *either* the "categorical" or "modified categorical" approach in determining whether Mr. Pradilla's "money laundering" offense under 18 U.S.C. § 371 was a crime "relating to" a "controlled substance" so

as to make him deportable. The Court below therefore erred in denying the Petitioner's petition for review.[4] The instant Petition should be granted (1) to correct a ruling of a Court of Appeals which is in conflict with the decisions of this Court, (2) to resolve a split in the Circuit Courts of Appeals regarding the application of the categorical and modified categorical approaches, particularly regarding the government's burden of proof in establishing whether a given offense constitutes a ground for removability, and (3) to address an important matter relating to the uniformity of treatment of aliens throughout the United States.

## I. Pursuant To Supreme Court Precedent, The Use Of Either The Categorical Or Modified Categorical Approach Is *Required* In Determining The Legal Effect Of A Conviction For Immigration Purposes.

The "categorical" approach looks solely to the structure and text of the statute that is the subject of the conviction in order to determine whether a person who is convicted under that statute has been convicted of a deportable offense. In *Leocal*, *supra*, for example, this Court considered whether an alien's conviction for driving under the influence (DUI) and causing serious bodily injury in an accident, under Florida law, constituted an "aggravated felony" for purposes of the Immigration and

[4] In its decision dated July 5, 2006, App. 1-4, the Eleventh Circuit construed the Petitioner's appeal of the District Court's denial of the habeas claim as a petition for review pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., 119 Stat. 231, amending 8 U.S.C. § 1252. At oral argument, neither party contested the fact that the appeal should be construed as a petition for review under the Act.

Nationality Act (the "INA"). *Leocal*, 543 U.S. at 3-4, 125 S.Ct. at 379-80. The Eleventh Circuit had previously dismissed the alien's petition for review. *Id.* at 4. After applying the categorical approach, this Court held that the crime committed was not a "crime of violence," and therefore, was not an "aggravated felony" warranting deportation. *Id.* at 11-12. To determine whether the offense constituted a "crime of violence," this Court utilized the "categorical approach"; i.e., what must be analyzed are "the elements and the nature of the offense of conviction, rather than [looking] to the particular facts relating to petitioner's crime." *Id.* at 7.

Most recently, on December 5, 2006, in *Lopez v. Gonzales*, 549 U.S. ___, 2006 WL 3487031 (2006), this Court considered whether a South Dakota felony offense of aiding and abetting the possession of cocaine could be considered a "drug trafficking crime" so as to make a lawful permanent resident deportable for having committed an "aggravated felony" under the INA. *Id.* at *2. In determining that the relevant offense amounted to "simple possession" and thus did not constitute a drug trafficking crime under federal law, the Court applied the categorical approach as follows: "And if we want to know what felonies might qualify, the place to go is to the definitions of crimes punishable as felonies under the [Controlled Substances] Act; where else would one naturally look?" *Id.* at *4.

If the statute of conviction is *not* a categorical match because it criminalizes both conduct that does and does not qualify as an "aggravated felony," then a court must utilize the "modified" categorical approach. Supreme Court precedent makes clear that the "modified" categorical approach provides specific limitations on what documents

may be considered, in addition to applying the statutory text, to determine the nature of a given offense. For example, in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 (2005), the defendant entered a guilty plea to one count of being a felon in possession of a firearm. The government requested a sentencing enhancement under the Armed Career Criminal Act (ACCA). In determining whether such an enhancement was proper, this Court utilized the modified categorical approach to determine what documents may be considered in determining the nature of a "generic" conviction: "the charging document, written plea agreement, transcript of plea colloquy, and any explicit findings by the trial judge to which the defendant assented." 125 S.Ct. at 1257; *see also Taylor v. United States*, 495 U.S. 575, 598-600 (1990) (applying the modified categorical approach to a conviction after a jury trial, and holding that a sentencing court may find that a defendant was convicted of "burglary" if charging papers and jury instructions actually required the jury to find all elements of generic burglary in order to convict the defendant).

The policy rationale for implementing the categorical and modified categorical approach is that the immigration courts should not conduct a detailed review of the facts of each case, so as not to duplicate the efforts of the criminal courts, waste scarce resources, present difficult questions as to what evidence could be submitted and what rules would be followed, and raise the possibility of unfair results. *Taylor*, 495 U.S. at 601-02. As the Supreme Court has noted, "an elaborate factfinding process regarding the defendant's prior offenses would be impracticable and unfair," *Taylor*, 495 U.S. at 577, 601, so the categorical approach was adopted as a "pragmatic conclusion about

the best way to identify generic convictions in jury cases, while respecting Congress's adoption of a categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction." *Shepard*, 544 U.S. at 20.

## II. There Is A Split In The Circuits As To The Application Of The Categorical Or Modified Categorical Approach In Cases Not Involving Aggravated Felonies.

Despite the guidance provided by this Court in cases such as *Leocal*, *Lopez*, *Shepard*, and *Taylor*, discussed *supra*, the Circuit Courts of Appeal are split on (i) *whether* to apply the categorical and modified categorical approaches in removal cases like the one at bar, and (ii) if they do use one or both approaches, *how* those approaches are properly applied.

The Ninth Circuit is arguably the most consistent Circuit in applying the categorical and modified categorical approach in determining the legal effect of a conviction for immigration purposes. For example, in *Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002), the Ninth Circuit discussed the "categorical" and "modified categorical" approaches, and explained that courts first must "look to the statute under which the person was convicted and compare its elements to the relevant definition of" a removable crime – *e.g.*, "aggravated felony," "crime of moral turpitude," or a crime "relating to a controlled substance" under the INA. *Chang*, 307 F.3d at 1189. Where the statute of conviction is a "divisible statute" that criminalizes both conduct that does and does not qualify as a removable crime (*e.g.*, a broad conspiracy statute such as 18 U.S.C. § 371), then the Ninth Circuit must proceed

to a "modified categorical" approach. *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000). Under the modified approach, the Ninth Circuit reviews the record of conviction to determine if there is sufficient evidence to conclude that a defendant was in fact convicted of the elements of the generically defined crime, even though his or her statute of conviction was facially over inclusive. *See Chang*, 307 F.3d at 1189; *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). "[T]he idea of the modified categorical approach is to determine if the record unequivocally establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive." *Corona-Sanchez*, 291 F.3d at 1210; *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391-93 (9th Cir. 2006) (applying the modified categorical approach to determine whether an alien's prior conviction constituted a crime of domestic violence).

The Ninth Circuit and other federal Courts of Appeal have employed the categorical and modified categorical approach in non-aggravated felony cases, too.[5] Crucially,

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[5] For example, the categorical and modified categorical approaches are used by many Circuits in determining whether a given criminal offense is a "crime of moral turpitude" under 8 U.S.C. § 1182(a)(2)(A)(i)(I) or § 1227(a)(2)(A)(i), which provisions dictate when an alien is inadmissible or removable from the U.S. *See, e.g., Patel v. Ashcroft*, 401 F.3d 400, 409 (6th Cir. 2005) (applying the categorical approach in determining that the alien was removable because his sexual assault conviction was a crime of moral turpitude); *Hashish v. Gonzales*, 442 F.3d 572, 576-77 (7th Cir. 2006) (applying the categorical approach in determining that the alien's Illinois conviction for misdemeanor theft was a crime of moral turpitude); *Cuevas-Gaspar v. U.S. Attorney General*, 430 F.3d 1013, 1017-20 (9th Cir. 2005) (applying the modified categorical approach in determining that the alien's offense of being an accomplice to residential burglary was a crime of moral turpitude); *Vuksanovic v. U.S. Attorney General*, 439 F.3d 1308, 1311 (11th Cir. 2006) (applying the categorical

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the Ninth Circuit applied the categorical and modified categorical approach in a case directly on point with the instant one, *Medina v. Ashcroft*, 393 F.3d 1063, 1065-66 (9th Cir. 2005), in which that Court had to determine whether a given crime was "relat[ed] to a controlled substance." The alien had been convicted in Nevada of "attempting to be under the influence of THC-carboxylic acid," a controlled substance found in marijuana. *Medina*, 393 F.3d at 1065. The Ninth Circuit explicitly applied the categorical and modified categorical approaches in determining that while that offense may relate to a controlled substance, the government had not proved that it did not fall under the small-amount marijuana exception set forth in 8 U.S.C. § 1227(a)(2)(B)(i).[6] *Id.*, at 1065-67. As a result, that Court reversed the removal order against the alien and remanded for further proceedings. *Id.*, at 1067.

However, the Fifth Circuit, in conflict with the Ninth Circuit, failed to apply the categorical and modified categorical approach in another case like the one at bar, dealing with whether or not a given offense was "relat[ed] to a controlled substance." In *Peters v. Ashcroft*, 383 F.3d 302, 307 (5th Cir. 2004), the Fifth Circuit examined whether the crime of "soliciting another individual to transport two or more pounds of marijuana for sale," related to controlled substances, and held that it did.

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approach in determining that a second-degree arson conviction was a crime of moral turpitude).

[6] *Cf. Lara-Chacon v. U.S. Attorney General*, 345 F.3d 1148, 1154-56 (9th Cir. 2003) (explicitly refusing to look beyond the statute of conviction, in holding that the alien's conviction for conspiracy to commit money laundering did *not* relate to controlled substances, though the pre-sentence report suggested that the laundered funds related to marijuana trafficking).

*Peters*, 383 F.3d at 306. That Court applied a ***nexus test***, hinging on whether there is a "nexus between the statute of conviction and controlled substance regulations or laws." The *Peters* case is therefore proof of a conflict between the Fifth and Ninth Circuits – *e.g.*, *Medina*'s categorical and modified categorical approach versus *Peters'* nexus approach in determining whether a crime relates to controlled substances.[7]

The First Circuit, like the Fifth Circuit, is in direct conflict with the Ninth Circuit. In *Urena-Ramirez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003), the court considered whether a conviction under the Travel Act, 18 U.S.C. § 1952 – "traveling in interstate commerce to promote a business enterprise involving cocaine (a controlled substance)" – was a violation of a law "relating to" a controlled substance, thus rendering the alien ineligible for discretionary relief from deportation. *Urena-Ramirez*, 341 F.3d at 54. The panel ignored the categorical and modified categorical approaches, instead utilizing something akin to the nexus test – i.e., "the degree to which the violation in question is connected to [the] underlying (drug-related) activity." *Id.* at 53 (citing *In re Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999)). As a consequence, the court examined the "underlying activity" of the respondent and

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[7] The *Peters* case is all the more puzzling because the Fifth Circuit has championed the broad use of the categorical and modified categorical approach in immigration cases. In *Omari v. Gonzales*, 419 F.3d 303, 307 (5th Cir. 2005), that Circuit stated that "[i]n determining whether a prior conviction qualifies as an aggravated felony (*or meets other similar criteria for immigration* or sentence enhancement *purposes*), we employ a categorical approach." (Emphasis added.) *See also James v. Gonzales*, 464 F.3d 505, 508 (5th Cir. 2006) (employing a categorical approach in an aggravated felony determination).

reasoned that [if] "the violation and the underlying activity are 'so closely related' that the two could not be considered 'separate or distinct,' then the two are essentially one. . . . " *Id.* The First Circuit held that the Travel Act conviction was for violation of a law "relating to" a controlled substance and also qualified as an "aggravated felony," rendering the alien ineligible for discretionary relief from deportation.

The Sixth Circuit has a different approach, though there is not a recent case from that Circuit on point, and though at times its standard resembles the nexus test. In *Castaneda v. INS*, 557 F.2d 79 (6th Cir. 1977), a case decided prior to *Taylor* and *Shepard*, the Sixth Circuit considered whether misprision of a felony concerning conspiracy to possess narcotics was a crime "relating to" controlled substances so as to render the alien deportable. That Circuit did not explicitly employ the categorical or modified categorical approach or the nexus test used by the First and Fifth Circuits, but instead asked whether the crime was "separate and distinct" from an underlying drug offense or whether they are "closely related." *Castaneda,* 557 F.2d at 83. It found that the conviction there did *not* "relat[e] to narcotics" and reasoned that "[h]istorically, the crime of misprision of felony has long been a criminal offense separate and distinct from the particular felony concealed." *Id.* at 83. Since *Castaneda*, the Sixth Circuit has not had occasion to review the question of whether a given crime "relat[es] to a controlled substance," and thus the *Castaneda* standard remains valid law in that jurisdiction.[8]

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[8] The BIA has employed the *Castaneda* test in several cases, including *Matter of Velasco*, 16 I&N Dec. 281 (BIA 1977) (holding that the alien's conviction for misprision of the felony of possessing marijuana with intent

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In sum, though most of the Circuits use the categorical or modified categorical approach in removal cases where the question is whether a conviction is an aggravated felony, they use conflicting tests regarding whether a conviction is "relat[ed] to controlled substances," the key question herein. The Ninth Circuit applies the categorical and modified categorical approach, while the First, Fifth, and Sixth Circuits analyze the relevant statutes and underlying facts on the basis of different criteria.

To that mix, ***the Eleventh Circuit has often not used the categorical or modified categorical approach at all, and in the instant case, failed to articulate or apply any test whatsoever***. One example of that Court's failure to use the categorical or modified categorical approach is *United States v. Richardson*, 233 F.3d 1285 (11th Cir. 2000). In *Richardson*, the Eleventh Circuit did not apply either approach, despite the controlling precedent of *Taylor*, in determining whether a defendant's two prior state court convictions for burglary constituted two separate felonies, thus qualifying him as an armed career criminal at sentencing.

Similarly, in *United States v. McGill*, 450 F.3d 1276 (11th Cir. 2006), the Eleventh Circuit failed to apply the categorical approach and determined instead that an Alabama felony DUI conviction constituted a "crime of violence" within the meaning of sentencing guidelines,

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to distribute was *not* an offense relating to a controlled substance) and *Matter of Carillo*, 16 I&N Dec. 625 (BIA 1978), and the test appears as recently as 1997, in *Matter of Batista-Hernandez*, 21 I&N Dec. 955, 958-60 (BIA 1997) (holding that the alien's conviction for accessory after the fact to a drug trafficking crime was *not* an offense relating to a controlled substance).

*contra Leocal*. *See McGill*, 450 F.3d at 1279-81. The court of appeals refused to find that *Leocal* controlled and instead looked solely to the language of the guidelines to determine the "crime of violence" issue. *Id.* at 1282; *see also United States v. Spell*, 44 F.3d 936, 938 (11th Cir. 1995) (holding that sentencing guidelines are authoritative and trump the categorical approach); *United States v. Tremble*, 933 F.2d 925, 928-29 (11th Cir. 1991) (failing to apply either the categorical or modified categorical approach, *contra Taylor*, and finding that sentence enhancement provisions for repeat narcotics offenders applied to the defendant whose prior state conviction for simple possession of cocaine was for an offense considered to be a felony by the state, even though the offense would have been a misdemeanor under federal law). *But cf. Vuksanovic v. U.S. Attorney General*, 439 F.3d 1308, 1311 (11th Cir. 2006) (utilizing a strict categorical approach in deciding that second-degree arson constituted a "crime involving moral turpitude" under immigration laws, and therefore refusing to consider the "factual predicate" for the offense.)

In the instant case, the Eleventh Circuit's lack of transparency makes it impossible to assess how it arrived at its conclusion. Certainly, however, the Eleventh Circuit panel failed to explicitly apply the categorical or modified categorical approach. Had it applied the categorical or modified categorical approach, it could only have reached the decision that Mr. Pradilla was not convicted of an offense relating to a controlled substance. The Petitioner violated 18 U.S.C. § 371, "conspiracy to defraud the U.S.," and the underlying offense was money laundering. The categorical approach asks whether the elements of 18 U.S.C. § 371 are related to controlled substances, *without* covering other restricted activities that are not related to

such substances. The clear answer is no. Mr. Pradilla could have been convicted of the same exact offense if he deposited more than $10,000 in a bank and knew the bank was purportedly not going to report the deposit, *and* the funds were the proceeds of a *non*-narcotics conspiracy (*e.g.*, a betting operation) or were not the proceeds of illegal activity at all. *Compare Lara-Chacon*, 345 F.3d at 1155 (noting therein that, "because of the breadth of the Arizona statute, Lara-Chacon's money-laundering conviction could have concerned proceeds from a number of illegal activities unrelated to controlled substances. Thus, nothing about the fact of Lara-Chacon's conviction demonstrates violation of a law related to a controlled substance"). In other words, his conviction could cover money laundering relating to or not relating to a narcotics transaction.

If the Eleventh Circuit had applied the modified categorical approach, the same conclusion would inexorably have applied; nothing in the record of conviction – meaning the various documents set forth by this Court in *Shepard* – establishes that Mr. Pradilla's conviction relates to a controlled substance. For example, the plea-hearing transcript confirms that Mr. Pradilla's crime was limited to money laundering, and that he was not involved in or necessarily knew about the drug sales. In summarizing what the government would have proved at trial, the prosecutor said:

> [B]etween October 1981 and June 1982, in the Central District of California and elsewhere, the defendant herein, Carlos Pradilla, along with several other codefendants, participated in a conspiracy to defraud the United States, in violation of Title 18, U.S.C. Section 371. . . . [W]hat the defendant did was basically *other members of the conspiracy* had access to large amounts of currency,

> which was derived from the sale of cocaine and which was transacted through more than one financial institution in Los Angeles for the purpose of defrauding the United States Government.
>
> Basically, *the defendant would take, deliver or transfer currency at the direction of others in the conspiracy to financial institutions or either others would deliver or transfer that money to financial institutions.*
>
> Prior to the delivery of the money to the banks, certain coconspirators of Carlos Pradilla had made an illegal agreement with the financial institutions to fail to file the necessary reports with the Department of Treasury. The defendant here, Carlos Pradilla, knew that the money was being transported for this purpose and knew that it was against the law.

DE 5 (Exh. I) – Plea Hearing Tr., p.6 (emphasis added). There was no allegation therein that Mr. Pradilla did anything other than handle currency, and there is no allegation that he knew that the funds might be the proceeds of drug trafficking activities.[9] Similarly, there is

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[9] The IJ concluded that at the plea hearing, Mr. Pradilla "acknowledged" that the funds were derived from drug sales. DE 5 (Exh. N), App. 48. That is untrue. The prosecutor made the long proffer above, which mentioned the drug sales by "other" co-defendants. The court asked Mr. Pradilla if he agreed with the facts that the prosecutor would establish "if this case went to trial." DE 5 (Exh. I) – Plea Hearing Tr., p.6. Mr. Pradilla answered yes, but *that assent goes to the facts of his own money laundering charge, because that would have been the subject of his trial*; his assent did not go to the narcotics side of the conspiracy. At no point did Mr. Pradilla acknowledge that at the time of the commission of his crime, he knew the funds were derived from drug deals.

The IJ also assumed that the Petitioner's offense was related to narcotics because the Petitioner had been charged, in Counts 2 and 3 of

(Continued on following page)

no statement in the Indictment, Plea Agreement, or Judgment that indicates that the Petitioner knew that his money laundering offense was related to the controlled substances offenses committed by other persons. Based on the documents authorized by this Court for review under the modified categorical approach, Mr. Pradilla's money laundering offense does not relate to a controlled substance.

## III. Even Where The Circuits Agree That The Categorical And Modified Categorical Approach Apply, There Is A Split Among The Circuits As To The Burden Of Proof Borne By The Government In Proving The Grounds Of Removability.

Among the Circuits that apply the categorical and modified categorical approaches, there are disagreements about how to implement such approaches, particularly regarding the government's standard of proof in establishing the grounds for removability. The First Circuit acknowledged and discussed this disagreement in depth in its opinion in *Conteh v. Gonzales*, 461 F.3d 45, 53-56 (1st Cir. 2006). That Circuit summarized the Ninth Circuit's praxis as requiring "that the alien have been *convicted of*

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the Indictment, with certain drug offenses. But both such charges were dismissed without ever having been brought to trial. *Compare Conteh*, 461 F.3d at 56 (requiring nothing less than a conviction for removal, stating that, "the distinction between *conviction for* and *commission of* an aggravated felony is an important one; because the BIA may not adjudicate guilt or mete out criminal punishment, it must base removal orders on *convictions*, not on conduct alone"); *Alaka v. U.S. Attorney General*, 456 F.3d 88, 108-09 (3rd Cir. 2006) (holding that the Immigration Court erred in relying upon dismissed charges in determining that the alien's offense was a "serious" one under the INA).

an aggravated felony," *Id.* at 54 (citing *Chang*, 307 F.3d at 1190-91), and hence requiring proof beyond a reasonable doubt that an aggravated felony has been committed. In contrast, the First Circuit noted that the INA merely "requires clear and convincing evidence of removability, *see* 8 U.S.C. § 1229a(c)(3)(A)," and thus proof beyond a reasonable doubt should not be required. *Id.* at 55. The First Circuit rejected the Ninth Circuit's approach as an overly "wooden application" of the *Taylor-Shepard* line of cases in an immigration context. *Id.* at 56. It added:

> We part company, however, in rejecting the implicit proposition that the INA's use of the word 'convicted' in 8 U.S.C. § 1227(a)(2)(A)(iii) elevates the government's burden in aggravated felony cases from clear and convincing evidence to proof beyond a reasonable doubt (that is, proof that facts were necessarily found by a criminal jury or admitted by the alien qua criminal defendant)."

*Id.* The *Conteh* decision opined that "the Ninth Circuit's grudging construction of section 1227(a)(2)(A)(iii) contravenes Congress's clear intent . . . [and] gives insufficient weight to the BIA's stated preference for using a modified categorical approach by giving lip service (and no more) to the word 'modified' in the locution." *Id.* The First Circuit stated that the Ninth Circuit's version is really an "unmodified" categorical approach, whereas a true modified categorical approach – and the lesser standard of proof – is appropriate in determining whether an alien's predicate offense necessitates a holding of removal. *Id.* at 54-56.

The instant case shows that that disagreement among the Circuits is far more pronounced than even the First Circuit suggests. The Ninth Circuit requires proof beyond a reasonable doubt, the First Circuit requires clear and

convicting evidence, but judging from the Petitioner's case, the Eleventh Circuit requires little or no proof at all of the grounds of removability. The documents in this case that are cognizable under *Taylor* and *Shepard* did not prove by even a preponderance of the evidence that Mr. Pradilla's money laundering offense was related to a controlled substance. To the contrary, in their decisions below, the IJ and Magistrate expressly determined that the Petitioner's offense related to controlled substances on the basis of drug charges against the Petitioner that were dismissed without ever having gone to trial. App. 34, 54. In other words, the decision upheld by the Eleventh Circuit utilized a standard of proof lower than mere probable cause. The chasm between the Ninth Circuit's requirement of proof beyond a reasonable doubt and the Eleventh Circuit's lack of any standard whatsoever could not be greater, necessitating this Court's intervention by means of granting the instant Petition.

## IV. The Uniform Application Of The Categorical Approach Presents An Issue Of National Importance And The Circuit Split Presents A Compelling Reason For The Granting Of The Instant Petition.

The Eleventh Circuit panel below failed to apply the categorical or modified categorical approach, and such failure is at odds with controlling Supreme Court precedent in *Leocal*, *Lopez*, *Shepard*, and *Taylor*, discussed *supra*. Moreover, and more crucially, the Eleventh Circuit's failure is symptomatic of a widespread and systemic failure on the part of many Circuit Courts to uniformly apply the categorical and modified categorical approach. Such a split presents an issue of national importance

affecting the statutory rights of aliens throughout the United States.

The inconsistent, or as occurred in the present case, non-existent application of the categorical or modified categorical approach violates both aliens' statutory rights and the precepts of good public policy. As this Court has stated, the "[p]ower to regulate immigration is unquestionably exclusively a federal power," and it is a well-settled policy that ***federal immigration and naturalization laws should be applied uniformly throughout the country***. *See, e.g., Lopez v. Gonzales*, Case No. 05-547, 549 U.S. __, at 10-12 (2006) (rejecting a rule in use in several Circuits and favored by DHS, because that rule led to the disparate treatment of aliens based on whether simple drug possession is a felony or misdemeanor in their particular states); *Plyler v. Doe*, 457 U.S. 202, 219 n. 19, 225, 102 S.Ct. 2382, 2396 n. 19, 2399 (1982) (rejecting a state law permitting public schools to refuse entry to undocumented alien children, because states cannot make alienage classifications without Congressional authorization); *DeCanas v. Bica*, 424 U.S. 351, 354, 96 S.Ct. 933, 936 (1976). Section 8 of the U.S. Constitution gives Congress the exclusive power to "establish a uniform Rule of Naturalization," and Congress has publicly declared that "[i]t is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 115, 100 Stat. 3559, 3384 (1986).

The policy aim of achieving national uniformity in immigration matters is most important and universally recognized where the matter lies at the heart of immigration, such as on questions of naturalization, the entry or

removal of immigrants, or granting of asylum. The case at bar involves the standards for determining whether an alien is removable, and hence is such a critically important question. The Circuits disagree on when to use the categorical and modified categorical approach and how to implement them, and thus significant geographic disparities exist in whether an alien may be found removable from the U.S.

The Petitioner's case is the best example of such disparity. An alien convicted in Florida under the federal money laundering statute could be deportable for having committed an offense "relating to" a "controlled substance," but yet not be deportable for having committed the same offense in California, Maine, or elsewhere. That is, in the Ninth Circuit, under *Medina*, the Petitioner would not have been found removable under the categorical or modified categorical approach, because there was nothing in the relevant documents proving a relationship between his particular regulatory crime and controlled substances. In the First Circuit, under *Urena-Ramirez*, the Petitioner would not have been held to have been removable because his regulatory crime bears no actual or historical nexus to a statutory drug offense, although the Magistrate errantly found otherwise. But in the Eleventh Circuit, the Petitioner was found removable on the basis of drug charges against him which were dismissed without trial. Such disparate treatment violates a fundamental tenet of our legal system – i.e., that similarly situated persons should be treated similarly – and runs against Congressional intent and the holdings of this Court in favor of a uniform, national approach on immigration matters. Accordingly, it is of vital national importance that this Court review the instant case.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 2, 2007

187 Fed.Appx. 959 [DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 05-13130

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D.C. Docket No. 04-20405 CV-JLK

CARLOS PRADILLA,

Petitioner-Appellant,

versus

ALBERTO GONZALES,
MICHAEL CHERTOFF,
Secretary, Department of Homeland Security,

Respondents-Appellees.

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Appeal from the United States District Court
For the Southern District of Florida

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**(July 5, 2006)**

Before ANDERSON, FAY and SILER,* Circuit Judges,

PER CURIAM:

The Immigration Judge ("IJ") ordered Carlos Pradilla deported on December 14, 2001. On January 20, 2004, the Board of Immigration Appeals ("BIA") issued its final

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

order of deportation. Pradilla challenged this order in a petition for writ of habeas corpus filed on February 19, 2004. The district court dismissed the habeas petition on March 31, 2005. Pradilla filed his notice of appeal to this court on May 24, 2005. Pradilla filed his appeal shortly after the May 11, 2005 effective date of the REAL ID Act, Pub.L. No. 109-13, 119 Stat. 311 (2005), which amended 8 U.S.C. § 1252 to eliminate aliens' ability to use habeas corpus petitions to challenge their removal orders and to establish the courts of appeals as the sole means of review. 8 U.S.C. § 1252(a)(5). The Act expressly provided that it would apply retroactively to cases in which the final order of removal was issued "before, on, or after" the May 11, 2005, effective date. Pub.L. No. 109-13, § 106(c), 119 Stat. 311 (2005). Section 106(c) of the Act specifically provides that cases pending in district courts at the time of enactment are to be transferred to the courts of appeals for handling as petitions for direct review; the statute is silent about how to handle habeas cases already pending before the courts of appeals.

As noted, the district court issued the final order dismissing the instant case, and closed the case, on March 31, 2005. However, the notice of appeal was not filed until May 24, 2005, shortly after the May 11, 2005, effective date of the Act. The jurisdiction of the district court over the case was not divested until the May 24 notice of appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 401 (1982). Thus, this case was pending in the district court on the May 11, 2005, effective date of enactment, and falls squarely within the language of the Act requiring transfer of the case to the court of appeals. Section 106(c) of Act provides as follows:

> (c) TRANSFER OF CASES. – If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section shall not apply.[1]

§ 106(c). Thus, the instant habeas corpus case, challenging a final order of deportation, is transformed into a petition for direct review, reviewable by this court pursuant to 8 U.S.C. § 1252(a)(5). We decline to require the futile act of

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[1] Section 242(b)(1), codified as 18 U.S.C. § 1252(b)(1), requires that petitions for direct review be filed within thirty days of the BIA's decision. As noted, a transformed habeas case is not subject to the thirty day deadline, but rather is to be treated as timely by the court of appeals. *See Ishak v. Gonzales*, 422 F.3d 22, 29 (1st Cir.2005). In the instant case, Pradilla's habeas petition was filed within the thirty day period, but under § 106(c) would have been treated as timely in any event.

remanding to the district court with directions that it enter an order transferring the case to this court.[2]

Turning to the merits of the petition for review, we conclude that the petition is without merit for reasons fully discussed at oral argument. Accordingly, the petition for review is

DENIED.

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[2] We note that the briefs of the parties in this case assumed that the case was pending in this court at the date of enactment. Although that assumption is incorrect, the case law indicates that the result would be the same in any event. At least five circuits have held that a habeas petition pending before the appeals court is transformed into a petition for direct review. *See Gittens v. Menifee*, 428 F.3d 382 (2d Cir.2005); *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733 (5th Cir.2005); *Ishak v. Gonzales*, 422 F.3d 22, 30 (1st Cir.2005); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir.2005); *Bonhometre v. Gonzales*, 414 F.3d 442 (3d Cir.2005); *see also Feldman v. Gonzales*, 2005 WL 3113488 (6th Cir. Nov. 21, 2005) (relying on *Bonhometre* to reach same conclusion without discussing rationale). These courts have reasoned that Congress merely made an oversight when it did not include habeas petitions pending in front of the courts of appeals, and that the clear intent of the legislation was to create one means of challenging orders of removal. *Alvarez-Barajas*, 418 F.3d at 1053; *Bonhometre*, 414 F.3d at 446. Although we need not so hold, the reasoning of these circuits appears to be sound.

**U.S. Department of Justice**
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A71 552 475-Miami Date: Jan. 20, 2004

In re: CARLOS PRADILLA-VILLAVECES

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nancy Harrison, Esquire

ON BEHALF OF DHS: Vera Hochberg
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – Nonimmigrant – remained longer than permitted

APPLICATION: Suspension of deportation; 212(h) waiver; adjustment of status; remand

The respondent appeals an Immigration Judge's December 14, 2001, decision denying him suspension of deportation, a waiver under section 212(h) of the Immigration and Nationality Act, and adjustment of status. The respondent contests the denial of all forms of relief. The respondent's request for oral argument before this Board is denied. 8 C.F.R. § 1003.1(e). The respondent's request for remand is denied. The appeal will be dismissed in part and sustained in part.

In 1991, the respondent was convicted of conspiracy to defraud the United States (money laundering) pursuant to 18 U.S.C. § 371. The Immigration Judge found the

respondent deportable under former sections 241(a)(1)(A), 241(a)(1)(B), and 241(a)(2)(B)(i) of the Act, respectively, 8 U.S.C. §§ 1251(a)(1)(A), 1251(a)(1)(B), and 1251(a)(2)(B)(i).

The respondent contends that we should remand the case to the Immigration Judge because the respondent lacked notice of charges of deportability under former sections 241(a)(2)(B)(i) and 241(a)(1)(A) of the Act. The respondent also contends that the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) withdrew those charges in a brief filed with the Immigration Court on February 14, 1997. Furthermore, the respondent argues that he was denied due process when the Immigration Judge found him ineligible for relief based upon charges for which he did not receive notice.

Although we find that the Immigration Judge erred in finding the respondent deportable based on former sections 241(a)(2)(B)(i) and 241(a)(1)(A) of the Act, we cannot agree that the Immigration Judge erred in finding that his conviction barred him from the requested forms of relief. The Immigration Judge may consider whether the respondent's conviction constitutes an offense which renders him ineligible for relief. There is no requirement that the respondent be given notice of a ground which may bar him from relief.

The respondent contends that he is eligible for a waiver under section 212(h). Inasmuch as we agree with the Immigration Judge that the respondent's conviction qualifies as an offense under former section 241(a)(2)(B)(i), an offense relating to controlled substances, we find no error in the Immigration Judge's decision finding the respondent ineligible for a waiver under section 212(h). *See Matter of N-*, 6 I&N Dec. 557 (BIA, A.G. 1955). Therefore, we need

not address the respondent's contention that his conviction does not qualify as an offense under former section 241(a)(1)(A) of the Act. Based on the foregoing, we affirm the Immigration Judge's denial of adjustment of status.

We now turn to the respondent's contention that the Immigration Judge erred in denying his application for suspension of deportation. We agree with the Immigration Judge that the respondent has not shown 7 years of continuous physical presence in the United States. In *Matter of Nolasco*, 22I&N Dec. 632 (BIA 1999), we held that the period of continuous physical presence ends with the service of the Order to Show Cause. The respondent entered the United States on December 3, 1985. The respondent's Order to Show Cause was issued on July 7, 1992. Therefore, we find no reversible error in the Immigration Judge's denial of suspension of deportation.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained to the extent that the Immigration Judge found the respondent deportable under former sections 241(a)(2)(B)(i) and 241(a)(1)(A) of the Act.

FURTHER ORDER: The respondent is deportable under former section 241(a)(1)(B) of the Act.

FURTHER ORDER: The appeal is affirmed to the extent that the Immigration Judge found the respondent ineligible for a waiver under section 212(h) of the Act, adjustment of status, and suspension of deportation.

/s/ Frederick D. Hess
FOR THE BOARD

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

CARLOS PRADILLA,

Plaintiff,

v.

JOHN ASHCROFT, as Attorney General of the United States; TOM RIDGE, as Secretary of the U.S. Department of Homeland Security,

Defendant. /

**CASE NO. 04-20405-CIV-KING**

**FINAL ORDER OF DISMISSAL**

(Filed Mar. 31, 2005)

THIS CAUSE is before the Court upon Magistrate Judge O'Sullivan's February 17, 2005 Report and Recommendation (R&R) (DE # 32) recommending that Petitioner Carlos Pradilla's Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief be denied. On March 4, 2005, Petitioner filed an Objection to the R&R and on March 28, 2005 Respondent filed a Response.

The Court finds Petitioner's Objection unpersuasive. The Court further finds that the R&R contains a thorough and well-reasoned recommendation.

Accordingly, after a careful review of the record and the Court being otherwise fully advised, it is ORDERED and ADJUDGED that Magistrate Judge O'Sullivan's February 17, 2005 R&R be, and the same is hereby, AFFIRMED and ADOPTED. It is further ORDERED and

ADJUDGED that Petitioner Carlos Pradilla's Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief be, and the same is hereby, DENIED and the case is closed.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 31st day of March, 2005.

/s/ James Lawrence King
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

cc: Magistrate Judge O'Sullivan

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-20405-CIV-KING/O'SULLIVAN

CARLOS PRADILLA,

Petitioner/Plaintiff,

v.

JOHN ASHCROFT, as Attorney General of the United States; TOM RIDGE, as Secretary of the U.S. Department of Homeland Security,

## REPORT AND RECOMMENDATION

(Filed Feb. 17, 2005)

THIS MATTER is before the Court on Carlos Pradilla's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Declaratory and Injunctive Relief (DE # 1, 2/19/04). On October 19, 2004, the Honorable United States District Judge James Lawrence King referred the petitioner's Writ for a Report and Recommendation thereon (DE # 25). The undersigned held a hearing and heard oral argument on the Petition on January 25, 2005. Having reviewed the petition, the Respondent's Return to Petition for Write [sic] of Habeas Corpus (DE # 20, 5/18/04), and the Petitioner's Reply to the Respondent's Return to Petition for Writ of Habeas Corpus (DE # 24, 10/18/04) and both parties' supplemental memoranda[1] and having carefully considered the arguments and

[1] At the close of oral argument, the undersigned asked the parties to brief the issue regarding the appropriate standard of review concerning the BIA's conclusion that the petitioner's conviction is one

(Continued on following page)

the law therein and those presented to the Court during oral argument, the undersigned respectfully **RECOMMENDS** that the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and the Complaint for Declaratory and Injunctive Relief (DE # 1, 2/19/04) be **DENIED** and the case dismissed as set forth below.

## I. INTRODUCTION

### A. Petitioner

The petitioner, Carlos Pradilla, is a fifty-one-year-old citizen of Colombia. He has been living in the United States for nineteen years, since his last entry into the United States on December 3, 1985. He currently resides in South Florida with his wife, his two children and his daughter-in-law. The petitioner's wife has a pending application for labor certification with the U.S. Citizenship and Immigration Service. His daughter is sixteen years old and is a natural born United States citizen attending high school locally. His twenty-five year old son has adjusted his status to that of a lawful permanent resident. He is married to a United States citizen and is pursuing a Masters in Business Administration at a local university.

The petitioner has a degree in agriculture science. He operates an ornamental plant nursery and an ornamental plant farm in South Florida and employs approximately twenty-five to thirty local residents.

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"related to a controlled substance." The parties filed their memoranda on February 1, 2005. (DE # 30 and DE # 31).

1. Arrival in the United States and Indictment by Grand Jury

The petitioner first entered the United States in 1981, with his family, on a tourist visa. On July 8, 1982, a Grand Jury sitting in the Central District of California returned an indictment that charged the petitioner[2] and approximately twenty other people with conspiracy to defraud the United States (18. U.S.C. § 371); willful failure to report domestic currency transaction (31 U.S.C. § 1059); interstate and foreign travel and transportation in aid of racketeering enterprise (18 U.S.C. § 1952); conspiracy to possess with intent to distribute narcotic drug controlled substance (21 U.S.C. § 841); unlawful use of communication facility (21 U.S.C. § 843(b)); continuing criminal enterprise (21 U.S.C. § 848); and aiding and abetting (18 U.S.C. § 2). *See* Exh. A to Respondent's Return (DE # 20, 5/18/04).

The petitioner was specifically charged in several counts of the indictment. Most significant to analysis of the petitioner's pending writ is Count I of the indictment. Count I (18 U.S.C. § 371) alleged, among other things, that the petitioner and others knowingly and willfully caused financial institutions to fail to file currency transaction reports (IRS Form 4789) for currency transactions involving $10,000 or more, said offense being in furtherance of the commission of other violations of federal law and committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve month period. Count I further alleged that petitioner and others knowingly and willfully traveled in interstate and foreign

[2] The petitioner is named in Counts I through IV of the indictment.

commerce and used any facility in interstate and foreign commerce and caused such travel and use with intent to distribute the proceeds of an unlawful activity, namely narcotics and controlled substances in violation of 18 U.S.C. § 1952. Specifically, the indictment alleged that the petitioner and others used a clothing business as a front for a money laundering service they provided for major narcotics traffickers and that the petitioner and others used coded language, including the term "dresses," to indicate large quantities of currency that needed to be moved. According to Count I, during the period of November 17, 1981 to June 21, 1982, the petitioner and others caused approximately fifty-one currency transactions totaling more than $25 million. Among the overt acts in Count I are conversations between the petitioner and two other defendants alleging that, in May 1982, the petitioner was in possession of $50,000 in currency and discussing the delivery of "50 dresses." (DE # 20, Exh. A, ¶s 74 and 75).

The petitioner was also named in Counts II, III and IV of the indictment. Count II alleged that the petitioner and others conspired to knowingly and willfully aid, abet, counsel, command induce and procure the knowing and intentional possession with intent to distribute and distribution of cocaine. Count III alleged that the petitioner and others conspired to knowingly and intentionally possess with intent to distribute and distribute cocaine. Count III also alleged that two other defendants "supplied large quantities of cocaine and caused the cocaine to be stored and distributed by defendant PRADILLA, and others," (DE # 20. Exh. A, Count III, Means of the Conspiracy, p.21) and that, in May 1982, the petitioner delivered a large quantity of cocaine to a co-defendant. (DE # 20, Exh.

A, Count III, p. 25 ¶ 20). Count IV alleged that the petitioner and several others aided, abetted, counseled, commended, induced, procured and willfully caused another defendant to possess with intent to distribute approximately thrity[sic]-seven (37) pounds of cocaine, a schedule II narcotic drug controlled substance. (DE # 20, Exh. A, Count IV, p. 27).

2. 1985 Return to United States and 1991 Conviction

Although the record is unclear as to the precise timing, at some point in 1982, the petitioner departed the United States and returned to Colombia. On December 3, 1985, the petitioner entered the United States in Miami, Florida for the second and final time. He was admitted to the United States with his family on a tourist visa. He has been in the United States ever since, and as set forth in the section above, the petitioner proceeded to build a life and a business in the United States.

On July 12, 1991, pursuant to a guilty plea to Count I of the 1982 indictment, the petitioner was convicted of conspiring to defraud the United States in violation of 18 U.S.C. § 371. As a result of his plea and his conviction, he was sentenced to three years probation and a $1,000 fine. During his plea proceeding, the Assistant United States Attorney proffered that the United States would have established at trial: that the petitioner "along with several other codefendants," participated in a conspiracy to defraud the United States in violation of Title 18 U.S.C. Section 371; that other members of the conspiracy had access to large amounts of currency, derived from the sale of cocaine; and that the petitioner "would take, deliver or transfer the currency at the direction of others in the

conspiracy to financial institutions." (DE # 20, Exh. L, p.5-6). The defendant agreed to the facts as stated and pled guilty to Count I of the indictment.

### B. Procedural History

On June 10, 1992, the Immigration and Naturalization Service ("INS")[3] issued an Order to Show Cause, ("OSC"), Notice of Hearing and Warrant for Petitioner's Arrest. There is no record evidence that this OSC was ever served on the petitioner. On July 3, 1992, the INS issued a superceding OSC, which was personally served on the petitioner on July 7, 1992. The superseding OSC was not filed with the Immigration Court until December 13, 1993.

The superceding OSC charged that the petitioner was deportable from the United States on several grounds. First, in violation of INA § 241(a)(2)(B)(I)[4], at any time after entry to the United States, he was convicted of a crime relating to a controlled substance as defined in 21 U.S.C. § 802. Second, he was an excludable alien at the time of his entry into the United States or at the time of his adjustment of status. *See* INA § 241(a)(1)(A). The basis for petitioner's excludability was that he fell under INA § 212(a)(2)(C)[5] as an alien whom a consular or immigration officer knew or had reason to believe had been an illicit

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[3] On March 1, 2003, the INS was reconstituted as the Bureau of Immigration and Customs Enforcement and the Bureau of U.S. Citizenship and Immigration Services, both within the Department of Homeland Security. Because the rulings at issue in this case were largely made when the agency was still the INS, the undersigned refers to it as the INS in this Report and Recommendation.

[4] Citations to Section 241 of the INA refer to 8 U.S.C. § 1227.

[5] Citations to Section 212 of the INA refer to 8 U.S.C. § 1182.

trafficker in any controlled substance. Third, the OSC alleged that the petitioner had overstayed his 1985 tourist visa in violation of NA § 241(a)(1)(B).

On January 27, 1995, the government held a master calendar hearing on the OSC, at which the petitioner appeared. The petitioner conceded his deportability and requested suspension of deportation under Section 244 and voluntary departure under INA Section 244(e).

Shortly after the master calendar hearing, in April 1995, the Department of Labor granted the petitioner's then-pending application for a labor certification as an agronomist. On August 14, 1995, the the [sic] INS filed a motion to pretermit the request for suspension of deportation made by the petitioner at the master calendar hearing. The Immigration Judge granted the motion on August 21, 1995, reasoning that the petitioner's conviction barred the requisite finding of good moral character.

Based on the labor certification he had been granted, the petitioner filed an Application for Adjustment of Status (I-485) with the INS on December 27, 1996. Four days later, he filed a Motion to Conditionally Terminate or Administratively Close Deportation Proceedings Pending Adjustment of Status Application or Suspension of Deportation. On February 14, 1997, the INS filed a response to the petitioner's motion and notified the immigration judge that it was withdrawing the deportation charges concerning INA § 241(a)(2)(B)(I) (conviction of a crime relating to a controlled substance after entering the United States) and § 241(a)(1)(A) (excludable at the time of entry into the United States or at the time of adjustment of status).

In March, the immigration judge granted the INS' motion to pretermit the petitioner's December 1996

request for suspension of deportation. The Immigration Court terminated the petitioner's deportation proceedings. In October 1997, the petitioner's deportation proceedings were reopened after the INS filed a motion for reinstatement arguing that the proceedings were terminated erroneously as the result of clerical error.

In June of 1998, a new Immigration Judge held a master calendar hearing in the petitioner's case. He ordered the parties to brief the legal issues raised by the petitioner's pending application for adjustment of status and established an August deadline for the INS to file any additional charges against Mr. Pradilla. In November 1998, the Judge reset the case and directed the petitioner fo [sic] file an application for a waiver of inadmissibility pursuant to INA § 212(h).

On February 26, 1999, the petitioner filed his application for a waiver of inadmissibility, and on July 26, 2000, the Immigration Court held a hearing on the merits of the deportation charge against the petitioner as well as the application for waiver of inadmissibility.

On December 14, 2001, the Immigration Judge issued a decision holding that the petitioner was deportable as charged under each of the three sections originally charged in the superseding OSC of July 1992. The Immigration Judge further held that the petitioner was ineligible for a waiver of inadmissibility, denied his application for suspension of deportation, and ordered him to be deported.

The petitioner appealed the Immigration Judge's ruling to the Bureau of Immigration Appeals (BIA). On January 20, 2004, the BR dismissed in part and sustained in part the petitioner's appeal. First, the BIA found the

petitioner was not deportable under INA § 214(a)(2)(B)(I) and INA § 241(a)(1)(A)[6] but that he was deportable for staying beyond the time permitted by his visa INA § 241(a)(1)(B). Next, the petitioner was ineligible for a waiver of inadmissibility and for adjustment of status on the basis of his conviction. Finally, the BIA held that the petitioner was ineligible for suspension of deportation for failure to meet the seven year continuous presence requirement of § 244. The BIA found that his continuous presence in the United States began on December 3, 1985 when he entered the United States and ended on July 7, 1992 when the OSC was served on the petitioner; thus, his continuous presence amounted to only six and one-half years, or less than the seven years required under the law.

On February 19, 2004, the petitioner filed the instant Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Declaratory and Injunctive Relief (DE # 1).

## II. Analysis

### A. Jurisdiction and Standard of Review

The government argues that the petitioner should have brought his appeal in the Court of Appeals. The undersigned disagrees. Under the current law, the petitioner cannot avail himself of judicial review before the Court of Appeals. Pursuant to 8 U.S.C. § 1252(a)(2)(B), federal law now precludes judicial review of any judgment

[6] The BIA decision does not delineate the board's reasons for concluding that the petitioner is not deportable on those grounds. However, it appears that the BIA based its holding on the INS' decision to withdraw the related charges back in February of 1997.

regarding the granting of relief under section 1182(h) (waivers of inadmissibility) and regarding any other forms of discretionary relief (including cancellation of removal and adjustment of status), except asylum under section 1158(a). The statute provides:

> 1252. Judicial review of orders of removal
>
> (a) Applicable provisions.
> (2) Matters not subject to judicial review.
> (B) **Denials of discretionary relief.** Notwithstanding any other provision of law, no court shall have jurisdiction to review –
> (I) any judgment regarding the granting of relief under section 212(h), 212(I), 240A, 240B, or 245 [8 USCS 1182(h), 1182(I), 1229b, 1229c, or 1255], or
> (ii) any other decision or action of the Attorney General the authority for which is specified under this title [8 USCS 1151 et seq.] to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [8 USCS 1158(a)].

(Emphasis added.)

In light of the judicial preclusion language in the INA, the Court of Appeals has jurisdiction only to review the threshold issues of whether the Petitioner is (1) an alien, (2) who is removable, (3) based on having committed a disqualifying offense. *Moore v. Ashcroft,* 251 F.3d 919, 923 (11th Cir. 2001). Neither party disputes that each of these three threshold issues is met – the petitioner concedes that he is an alien who is deportable for overstaying his visa. There is no need for the petitioner to avail himself of the Court of Appeals for such a determination before seeking the writ of habeas corpus.

It is now well-established that the federal district courts retain jurisdiction over habeas petitions filed by aliens subject to a federal removal order. *See INS v. St. Cyr*, 533 U.S. 289, 302 (2001); *Cadet v. Bulger*, 377 F.3d 1173, 1182 (11th Cir. 2004). The Court of Appeals for the Eleventh Circuit held recently that the scope of habeas review available in habeas petitions brought pursuant to § 2241 by aliens challenging removal orders "includes constitutional issues and errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts" but "does not include review of administrative fact findings or the exercise of discretion." *Cadet*, 377 F.3d at 1184.

Pursuant to the petitioner's writ of habeas corpus, the operative decision for review by this Court is the decision of the Bureau of Immigration Appeals. The Court may also review the Immigration Judge's reasoning to the extent that it is adopted by the BIA in reaching its conclusions. *See Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001).

## B. Suspension of Deportation

### 1. Legal Standards

Before the IIRIRA amendments in 1996, suspension of deportation was a form of relief from deportation and was governed by INA Section 244, 8.U.S.C. § 1254.[7] Under that provision, an alien was eligible for suspension

[7] Section 244 was repealed and replaced by INA Section 240A. Among the changes made by Section 240A is a change in terminology. Under the current law, suspension of deportation is referred to as cancellation of removal.

from deportation if (1) he or she "ha[d] been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of [the] application' for suspension; (2) he or she was a person of "good moral character;" and (3) deportation would result in "extreme hardship" to an alien or to an immediate family member who was a U.S. citizen or lawful permanent resident. Importantly, before the 1996 amendments, an alien could continue to accrue the "continuous physical presence" that would permit him to avail himself of suspension during the time that he was in deportation proceedings. *See* 8 U.S.C. § 1254(a)(1) (1995) (repealed 1996).

The 1996 amendments eliminated the alien's ability to accrue continuous physical presence while in deportation proceedings. The new law specified that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear or when the alien is convicted of one of several specified offense, whichever is earliest.["] IIRIRA of 1996 309(c)(5), 110 Stat. 3009, 3009-627 (1996), INA 240A(d)(1), 8 U.S.C. 1229b(d). The new law is referred to as the "stop-time" rule.

Following the 1996 amendments, some confusion resulted from Congress' use of the term "notice to appear" rather than the term "order to show cause." In 1998, Congress amended the provision to clarify that the stop-time rule "shall apply to orders to show cause . . . issued before, on, or after the effective date of the enactment of this Act." NACARA 203(a)(1), P.L. No. 105-100, 203(a), 111 Stat. 2160, 2196-2198 (1998). The BIA holds that this retroactivity provision "applie[s] generally" to aliens whose deportation proceedings were pending as of the effective

date of IIRIRA. *See Matter of Nolasco,* 22 I & N Dec. 632 (1999) (en banc). The petitioner's deportation proceedings, which began in 1993, three years before the IIRIRA amendments, and were pending in 1996, fall into this category.

2. Petitioner's Application for Suspension of Deportation

The petitioner concedes that he is deportable under INA Section 241(a)(1)(B) for overstaying his tourist visa. The BIA held that he was deportable on that ground, and not on the other two grounds previously advanced and then withdrawn by the INS. *See Matter of Ching,* 12 I & N Dec. 710 (BIA 1968) (holding that an alien who was convicted of a narcotics offense but not charged with deportability on that basis was eligible for suspension of deportation). The parties are in agreement that the petitioner's request for suspension of deportation is properly evaluated under former INA § 244, 8.U.S.C. § 1254. However, the petitioner argues that the BIA violated his statutory right to seek suspension of deportation under Section 244 by refusing to withhold application of the stop-time rule in his case.

As set forth above, the petitioner is eligible for suspension of deportation if (1) he had been physically present in the United States for a continuous period of not less than seven years; (2) he was a person of good moral character for that entire period; and (3) his deportation would result in extreme hardship to the alien or to an immediate family member who is a U.S. citizen or lawful permanent resident. *See* INA § 244(a)(1), 8 U.S.C. § 1254(a)(1).

The Immigration Judge and the BIA applied the Section 244 analysis to petitioner's request. Turning first to the question of continuous presence, the BIA affirmed the Immigration Judge's reasoning that, under the "stop-time" rule enacted by Congress, the petitioner's continuous physical presence ended on July 7, 1992, when the petitioner was served with the OSC. Because the petitioner entered the United States on December 3, 1985, the petitioner's continuous physical presence amounts to 6 years and seven months, which is less than the seven years required by Section 244. Therefore, the petitioner is not eligible for the relief of suspension of deportation.

The petitioner contends that the BIA applied the stop-time rule to the petitioner in error because the INS unreasonably delayed the petitioner's proceedings. The petitioner relies on two cases, *Aoun v. INS,* 342 F.3d 503 (6th Cir. 2003) and *Otorola v. INS*, 270 F.3d 1272 (9th Cir. 1997). Neither of these cases is persuasive.

In *Otorola,* the Ninth Circuit did not apply the stop-time rule to an alien who had been *granted* suspension of deportation by an Immigration Judge in October 1996 and whose deportation proceedings were then delayed by INS filing and maintaining a meritless appeal, which subsequently brought the proceedings within the stop-time rule. *Otorola,* in which the alien *prevailed* initially on suspension of deportation, is clearly distinguishable from the present case.

In *Aoun*, 342 F.3d 503 (6th Cir. 2003), a Lebanese alien appealed the BIA's refusal to reopen his application for suspension of deportation because the stop-time rule had been enacted while his proceedings were administratively closed. *Id.* at 504. Aoun had originally filed an

application for suspension in 1986 but withdrew it based on erroneous advice from his attorney. In 1987, he asked the BIA to remand his case and allow an application for suspension, but before the BIA ruled on that request, his proceedings were administratively closed and "continued indefinitely." *Id.* In 1993, the INS filed a motion with the Board to reinstate the deportation proceedings, but the BIA, inexplicably, did not grant the motion for approximately six and a half years, until June of 2000. During this period between 1993 and 2000, the stop-time rule was enacted and made retroactive. *Id.* Upon reopening the case and without explanation for the six year delay, the BIA denied Aoun suspension of deportation based on the stop-time rule. In his case, the Court of Appeals for the Sixth Circuit held that it would be inequitable to subject Aoun to the stop-time rule, given the six year administrative closure of his case and the unexplained six year delay in reopening the case upon INS motion. *Id.* at 506-07.

In its response to the instant petition, the government rightly notes that the Eleventh Circuit has not sanctioned the invocation of equitable principles to avoid the application of the stop-time rule. Rather, it appears that, if presented with the issue, the Eleventh Circuit would not do so. In 2001, the Eleventh Circuit decided *Al Najjar v. Ashcroft,* 257 F.3d 1262, agreeing with the BIA that the stop-time rule applied to an alien whose 1985 deportation proceedings were administratively closed, not recalendared until 1996, and not ruled on by the immigration judge until 1997, after the stop-time rule took effect. Moreover, the Sixth Circuit's approach in *Aoun* appears to be confined to its unique facts. *Aoun* has not been followed in another Circuit, and, significantly, in the Sixth Circuit, it has not been followed but rather distinguished. *See*

*Bazzi v. Ashcroft,* 2004 U.S. App. LEXIS 27275 (6th Cir.), at *16-18 (distinguishing instant facts involving Lebanese alien whose deportation proceedings lasted thirteen years from those in *Aoun*).

Given the limited application of the equitable approach taken in *Aoun* and the Eleventh Circuit's decision in *Al-Najjar,* the undersigned finds that the petitioner's argument that the INS should be estopped to apply the stop-time rule to his suspension of deportation request lacks merit.[8] The application of the stop-time rule to the petitioner's request was correct, in accordance with the law of this Circuit, and does not constitute grounds for a remand to the BIA.

### C. Waiver of Inadmissibility

#### 1. Background and Legal Standards

At his deportation hearing, on the basis of the labor certification he had received from the Department of Labor, the petitioner also sought adjustment of status

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[8] Even if the Eleventh Circuit sanctioned the invocation of equitable principles in this context, the undersigned finds that their application as to the petitioner would be inappropriate. For instance, the delay caused by the administrative closure of his case was seven months. The case terminated in March of 1997. In September, the INS moved to reinstate the proceedings and the motion was granted in October. Moreover, in August 1995, before the stop-time rule had been enacted, the Immigration Judge had already pretermitted the petitioner's suspension application on the basis that his criminal conviction prevented him from demonstrating good moral character. The undersigned does not find it credible that, but for the stop-time rule, the petitioner would have had such a settled or reasonable expectation of receiving suspension of deportation so as to justify the application of equitable principles in this case.

pursuant to INA § 245(a), 8 U.S.C. § 1255(a) as relief from deportation. In order to obtain adjustment of status, an alien must be able to demonstrate that he is admissible to the United States for permanent residence.

The INA establishes certain categories of aliens who are inadmissible to the United States. Not surprisingly, aliens who fall within these categories generally cannot demonstrate that they are admissible and are therefore not eligible for adjustment of status. Aliens who have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance[9] are inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(II). Furthermore, any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in a controlled substance or is or has been a knowing assistor, abettor, conspirator, or colluder with others in the illicit trafficking of a controlled substance is also inadmissible. 8 U.S.C. § 1182(a)(2)(C).

The INA does, however, provide for a waiver of inadmissibility, available at the discretion of the Attorney General under certain limited circumstances. See INA Section 212(h), 8 U.S.C. § 1182(h). Discretionary waivers of inadmissibility are available for an alien convicted of a crime involving moral turpitude. Waivers are generally unavailable to aliens convicted of offenses related to a controlled substance[10] and are completely unavailable to

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[9] This provision relates to "controlled substances" as defined in 21 U.S.C. § 802.

[10] There is one exception, which would be inapplicable to the petitioner. Inadmissibility based on a conviction related to a controlled

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aliens who the consular or immigration officer knows or has reason to believe have been illicit traffickers in (or knowing assistors in the trafficking of) a controlled substance.

Whether the petitioner is eligible to apply for a discretionary waiver of inadmissibility turns on two issues: first, the classification of petitioner's conviction, and second, on whether he is properly classified as an alien whom an immigration officer would have reason to believe had been a knowing assistor in the illicit trafficking of a controlled substance.

The petitioner's application for a waiver of inadmissibility was denied by the BIA. The BIA held

> Inasmuch as we agree with the Immigration Judge that the respondent's conviction qualifies as an offense under former section 241(a)(2)(B)(i), an offense relating to controlled substances, we find no error in the Immigration Judge's decision finding the respondent ineligible for a waiver under Section 212(h). See *Matter of N* –, 6 I & N Dec. 557 (BIA 1955). Therefore, we need not address the respondent's contention that his conviction does not qualify as an offense under former Section 241(a)(1)(A) of the Act. Based on the foregoing, we affirm the Immigration Judge's denial of adjustment of status.

(DE # 20, Exh. H, p.2).

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substance may be waived if the conviction concerns a single offense of simple possession of 30 grams or less of marijuana.

2. Matter of Fortiz-Zelaya

Before turning to an analysis of the proper characterization of petitioner's conviction, the undersigned addresses the petitioner's argument that the BIA should not have been permitted to find the petitioner *inadmissible* on grounds for which they did not find him *deportable.* Significantly, in the petitioner's case, back in 1997, the INS withdrew two of its charges concerning petitioner's deportability – INA § 214 (a)(2)(B)(i), conviction of a violation of a law related to a controlled substance, and INA § 241(a)(1)(A), an alien, who at the time of entry, was excludable based on an immigration officer's knowledge or reason to believe the alien was an illicit trafficker in or a knowing assistor, abettor or colluder in the illicit trafficking of controlled substances. The BIA held that Immigration Judge erred in finding the petitioner *deportable* under § 214 (a)(2)(B)(i) and INA § 241(a)(1)(A); although the BIA did not state its reasoning for such conclusion, it appears that BIA concluded that the petitioner could not be found deportable on a basis other than the basis actually charged by the INS. See *Matter of Ching*, 12 I & N Dec. 710 (BIA 1968). Rather, the BIA found that he was deportable as charged, for staying beyond the time permitted by his visa INA § 241(a)(1)(B).

The petitioner argues that, under *Matter of Fortiz-Zelaya*, in considering the question of his inadmissibility and his application for waiver, the BIA was limited to and could not look beyond the only grounds for deportation actually charged against the petitioner – the overstay. In *Matter of Fortiz-Zelaya*, a citizen of El Salvador entered the United States on a tourist visa in 1976 and eventually adjusted his status to that of lawful permanent resident in 1989. 21 I & N Dec. 1199, 1200 (BIA 1998). In 1992, he

was convicted of receiving stolen property (and sentenced to 90 days imprisonment) and, in 1994, he was convicted of malicious burning (and sentenced to four years imprisonment). *Id.* In 1994, the INS charged Fortiz with deportability as an alien convicted of two crimes of moral turpitude not arising from a single scheme of criminal misconduct. *Id.* at 1201.

During his deportation proceedings, Fortiz requested a Section 212(c) waiver of inadmissibility.[11] The INS argued that the Fortiz could not apply for the waiver because his malicious burning conviction constituted an aggravated felony and that aliens convicted of aggravated felonies were barred from receiving discretionary relief by Section 440 of the Antiterrorism Effective Death Penalty Act ("AEDPA"). The BIA disagreed, finding that "[i]nasmuch as the respondent was not charged with deportability as an aggravated felon, he is not barred from section 212(c) relief as an alien who 'is deportable' [as an aggravated felon]." p. 1201 n.3.

On its face, *Matter of Fortiz-Zelaya* appears to support the petitioner's argument, but upon closer examination, it is clear that this holding is tied to and limited to the language of Section 440 of the AEDPA. *See id.* at pp. 1205-1210 (concurring opinion). *see also Brown v. Ashcroft*, 360 F.3d 346, 352 (2d Cir. 2004). Section 440 bars both judicial review and 212(c) relief for aliens who are "deportable" based on having committed certain enumerated criminal offenses. AEDPA 440(a), (d), 110 Stat. 1276-77, That is, under Section 440, a finding of the alien's deportability on

[11] Under the current law, all waivers of inadmissibility are governed by INA Section 212(h).

one of the provision's requisite grounds is a necessary precondition to both the bar of judicial review and the bar of 212(c) relief.

The petitioner's case does not involve the application of Section 440 and is thus distinguishable from *Matter of Fortiz-Zelaya*. *See Brown v. Ashcroft*, 360 F.3d 346, 352 (2d Cir. 2004). In the petitioner's case, the Section 212(h) statutory bar to his application for waiver of inadmissibility turns on whether he has been "convicted" of an offense that bars relief (namely, a violation of law related to controlled substances) and not on whether he "is deportable" on that particular basis. *See id.*[12]

3. Inadmissability

The government's contention that petitioner, upon requesting adjustment of status, assimilated himself into the position of an alien outside the United States seeking entry as an immigrant, is consistent with BIA and other federal precedent. *See Jankowski-Burczyk v. INS*, 291 F.3d 172, 175 n.2 (2d Cir. 2002); *Palmer v. INS*, 4 F.3d 482, 484 (7th Cir. 1993); *Matter of Smith*, 11 I & N Dec. 325, 326-27 (BIA 1965). In the petitioner's case, his request for adjustment of status, and thus the question of his admissibility, must be evaluated as if he sought entry as an

[12] The undersigned notes that the language used by the Immigration Judge in his analysis of petitioner's eligibility for waiver is imprecise and likely gave rise to the petitioner's reliance on *Matter of Fortiz-Zelaya*. The Immigration Judge stated that because the petitioner "is deportable" on the basis of his conviction he is ineligible for waiver. It would have been more correct to say that the conviction rendered petitioner "inadmissible" and ineligible for waiver. *See* 8 U.S.C. § 1182 (a) (Classes of aliens ineligible for visas or admission).

immigrant to the United States on December 27, 1996, the date he filed his application for adjustment of status.

Petitioner bears the burden of demonstrating that he is admissible as of 1996. At that time, upon making his application for adjustment of status, the petitioner had already been convicted of Count I of the indictment. The question of his admissibility turns on whether, by virtue of his conviction, he falls into a category for which a discretionary waiver is available. *See* INA § 212(h), 8 U.S.C. § 1182(h). As set forth above, if he has been convicted of a law related to a controlled substance or if, by virtue of his conviction, an immigration officer would know or have reason to believe that he had been an illicit trafficker (or knowing assistor, abettor or colluder in illicit trafficking) of a controlled substance, then he is inadmissible and ineligible for a waiver.

a. Conviction Related to a Controlled Substance – 8 U.S.C. §1182(a)(2)(A)(ii)

Whether the petitioner's conviction under 18 U.S.C. § 371 is related to a controlled substance within the meaning of the INA is question of law to be reviewed by the court *de novo*. *Ramsey v. INS*, 55 F.3d 580, 582 (11th Cir. 1995) (holding that whether conviction for lewd assault constituted an aggravated felony is a question of law for *de novo* review). In the instant case, the BIA "agree[d] that the respondent's conviction qualifies as an offense under former section 241(a)(2)(B)(i), an offense relating to controlled substances" and "f[ound] no error in the Immigration Judge's decision finding the respondent ineligible for a waiver under section 212(h)." (DE #20, Exh. H at p.2). Where the BIA adopts the Immigration Judge's reasoning, it is appropriate for the court to examine the

Immigration Judge's decision. *See Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001).

Here, the Immigration Judge noted that the petitioner had been convicted of the crime of conspiracy and that he had been charged in Count III of the indictment with traveling in interstate and foreign commerce with the intent to distribute the proceeds of unlawful narcotics and controlled substances activities. In finding that the petitioner's conviction was related to a controlled substance, the judge relied on *Matter of N*, 6 I&N Dec. 557 (BIA, A.G. 1955), in which the Attorney General found a conspiracy conviction under 18 U.S.C. § 371 "related to a controlled substance" thus rendering the alien deportable.

The petitioner contends that it was error for the Immigration Judge, in evaluating his conviction, to consider Count III of the indictment or the other alleged objects of the conspiracy in determining whether the conviction "relates to" a controlled substance. Rather, he claims his conviction for conspiracy is separate and distinct from drug-related activity and that the Court should examine narrowly the statute of conviction without reference to any other statutes. The petitioner argues that *Matter of N*, cited by both the Immigration Judge and the BIA, is inapposite because the alien in that case was convicted specifically of a conspiracy to distribute heroin whereas the petitioner was convicted of conspiracy to defraud the United States.

The undersigned finds that *Matter of N* stands for the general proposition that, although conspiracy is a separate and distinct offense from the crime which is the object of the conspiracy, the INA's "relating to" language is construed to have broad coverage. 6 I & N Dec. at 560. In

interpreting the phrase "relating to," the BIA looks to the degree to which the violation in question is connected to underlying drug-related activity. *Urena-Ramirez v. Ashcroft*, 341, F.3d 51, 54 (1st Cir. 2003) (citing *In re Espinoza-Gonzalez*, 22 1 & N Dec. 889 (BIA 1999)). Where the conviction for a particular violation of the law and the underlying drug-related activity are so closely related that they cannot be considered separate or distinct, then the violation is one of a law relating to the underlying activity. *Id.* (internal citations and quotations omitted).

In this case, Count I of the indictment alleged "knowing and willful travel in interstate and foreign commerce . . . with intent to distribute the proceeds of an unlawful activity, namely narcotics and controlled substances. . . . " (DE # 20, Exh. A at p.4). As set forth above, Count I alleged that the petitioner and others used a clothing business as a front for a money laundering service they provided for major narcotics traffickers and that the petitioner and others used coded language, including the term "dresses," to indicate large quantities of currency that needed to be moved. Among the overt acts in Count I are conversations between the petitioner and two other defendants alleging that, in May 1982, the petitioner was in possession of $50,000 in currency and discussing the delivery of "50 dresses." (DE # 20, Exh. A, ¶s 74 and 75).

The petitioner plead guilty to Count I. Given the allegations in Count I concerning both the objects of the conspiracy and the overt acts specifically alleged on petitioner's part, the undersigned finds that the BIA did not err in concluding that the petitioner's conviction constituted a violation of law relating to a controlled substance. The allegations in Count I demonstrate that the petitioner's conspiracy conviction is so closely related

to the underlying drug offenses contained in the other counts of the indictment as to be a conviction "relating to" a controlled substance. *See Peters v. Ashcroft*, 383 F.3d 302, 308 (5th Cir. 2004) (holding that sufficient nexus existed between solicitation conviction and drug-related laws such that conviction related to a controlled substance); *Urena-Ramirez v. Ashcroft*, 341 F.3d 51, 55 (1st Cir. 2003) (holding that Travel Act violation was not separate and distinct from petitioner's involvement in the cocaine trade); *Matter of Beltran*, 20 I & N Dec. 521 (BIA 1992)[13] Therefore, there is no need to remand the issue to the BIA for reconsideration.

b. An Immigration Officer Knows or Has Reason to Believe Alien Is or Has Been an Illicit Trafficker in a Controlled Substance – 8 U.S.C. § 1182(a)(2)(C)

The BIA declined to reach the issue regarding whether petitioner's conviction is properly categorized as

[13] The BIA evaluated an alien's conviction of solicitation to possess narcotic drugs to determine whether the conviction was "related to" controlled substances so as to render him deportable. Beltran had been charged with solicitation to possess narcotic drugs as well as possession of narcotic drugs but plead guilty only to the crime of solicitation. He argued that the crime of solicitation was separate and distinct from the narcotics laws, that the statute did not specifically address controlled substances, and that, therefore, it was not a violation relating to a controlled substance. The Immigration Judge noted that, although Beltran had been convicted of the separate crime of solicitation, he had also been charged with possession and thus his solicitation conviction was related to a controlled substance. Similarly, in the present case, while petitioner plead guilty to the conspiracy charge, he was also charged in the indictment with possession with intent to distribute cocaine and the Immigration Judge took the charge into account in his analysis.

an "offense under former section 241(a)(1 )(A) of the Act." (DE #20, Exh. H at p.2). Thus, as the petitioner points out, the issue is not squarely presented for review by this court. However, in order to aid the District Court in its analysis of the petitioner's writ, the undersigned has considered whether the petitioner's application for waiver would also be barred under this provision.

Even if the Court were to conclude that the petitioner's conviction lacked a sufficient nexus to drug-related laws to render it a conviction "related to" a controlled substance (which would bar application for a waiver of inadmissibility), the undersigned has concluded, as set forth below, that, although the BIA did not base the petitioner's ineligibility for waiver on this ground, it could have done so. "Under these circumstances, it would be futile and inefficient to vacate the [BIA's decision] because, upon remand . . . the result would be the same." *Brown v. Ashcroft*, 360 F.3d 346, 354-55 (citing *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 79 (D.C. Cir. 1999); see also *NLRB v. Wyman-Gordon*, 394 U.S. 759, 766 n.6 (1969).

An alien is inadmissible at the time of his entry into the United States or at the time of his adjustment of status if he falls under INA § 212(a)(2)(C)[14] as an alien whom a consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any controlled substance or is or has been a knowing assistor, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance. Moreover, no discretionary waiver of inadmissibility under Section 212(h) is available to an alien who falls into this class.

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[14] 8. U.S.C. § 1182(a)(2)(C).

As set forth above, the petitioner bears the burden of demonstrating, at the time of his application for adjustment of status, that he is admissible and that he does not fall into this category. A review of the relevant case law demonstrates that the petitioner cannot meet that burden. The Eleventh Circuit has held that under this provision

> . . . does not exclude only those aliens who have been convicted . . . it is not necessary that an alien seeking admission have been convicted, or even arrested or investigated for drug trafficking in order to be inadmissible. . . . If credible evidence is presented to show knowledge or a reasonable belief that an individual has trafficked in drugs, the requirements . . . have been satisfied. If sufficient evidence shows such facts, an adjustment may properly be denied.

*Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (holding that narcotics conviction expunged pursuant to Federal Youth Corrections Act was proper basis for ruling petitioner inadmissible and ineligible for adjustment of status).

Under Eleventh Circuit precedent, the BIA may consider not only the petitioner's conviction but "credible evidence" that the petitioner has trafficked in drugs. Such evidence could include the other counts in the indictment and the petitioner's plea colloquy. On those bases, the BIA would have reason to believe, if not actual knowledge, that the petitioner had been an illicit drug trafficker or at the very least a knowing assistor or conspirator in the illicit trafficking of drugs. The petitioner is inadmissible on this basis and is ineligible for a waiver of inadmissibility. *See also Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (holding that alien found deportable for entering without

inspection and committing firearm violation was ineligible for adjustment of status due to arrest, but not conviction, on drug-related charges).

### D. Petitioner's Due Process Claim

The petitioner contends that he has a constitutionally protected right to seek adjustment of status and suspension of deportation and that the BIA violated his rights by concluding that, although he was not deportable because of his conviction, he was statutorily ineligible for a Section 212(h) waiver based on the conviction. However, under the law of this Circuit, "an alien has no constitutionally protected right to seek discretionary relief," *Balogun v. United States Attorney General*, 304 F.3d 1303, 1311 (11th Cir. 2002) (citing *Oguejiofor v. Attorney General*, 277 F.3d 1305, 1309 (11th Cir. 2002)).

The petitioner's case is analogous to a recent Second Circuit case, *Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004). In *Brown*, an alien in removal proceedings claimed that his due process rights were violated when he was not given advance notice that the INS would rely on grounds other than those charged in his Notice to Appear to challenge his eligibility for a 212(c) waiver of inadmissibility. *Id.* at 348. Brown, a lawful permanent resident of the United States, was arrested and plead guilty to two attempted robberies in 1994. In 1996, he plead guilty to a third 1994 robbery attempt. *Id.* INS based his removal proceedings on his 1994 convictions, charging him as deportable for having committed an aggravated felony. On remand, INS argued that Brown was barred from 212(c) relief because it was unavailable to "an alien who has been convicted on one or more aggravated felonies and has

served for such felony or felonies a term of imprisonment of at least 5 years." *Id.* at 349. The basis for INS' argument was the 1996 conviction, not the 1994 convictions upon which the deportation charges were based. The BIA affirmed the immigration judge's finding that Brown was barred from discretionary relief based on the 1996 conviction. *Id.*

In analyzing Brown's appeal, the Second Circuit distinguished between the "charges" brought against Brown in urging his removal (deportation) and the INS's "response" to his defense to removability. *Id.* at 351. The 1996 conviction was neither a new "charge" of deportability nor a new "factual allegation" supporting a charge. Rather, it was a defense to Brown's application for waiver. The court found that Brown had the burden of proof to establish his eligibility for the waiver and must have been aware that INS would attempt to rely on his 1996 conviction to bar relief. *Id.* The Court also agreed with the Fifth Circuit that "'there is no requirement, either statutory or constitutional, that all possible defenses or collateral remedies be explained' to the alien against whom the government is proceeding." *Id.* (quoting *Aalund v. Marshall*, 461 F.2d 710, 712 (5th Cir. 1972)).[15]

In this case, the petitioner also bears the burden of proof to establish his eligibility for a waiver of inadmissibility. Like the alien in Brown, the petitioner's 1992 conviction was not the basis of "charges" of deportability because the conviction-related charges were dropped by

[15] The Eleventh Circuit in *Bonner v. City of Prichard*, 661 F. 2d 1206, 1207 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

the INS. Rather, the conviction is properly invoked as a defense to his application for a waiver of inadmissibility. Furthermore, as a practical matter, in applying for the waiver, the petitioner was undoubtedly on notice that the INS would rely on his conviction to bar such relief because the petitioner had originally been charged with deportability on the basis of his conviction. Even if the petitioner could credibly argue that he was not on notice that the INS would contest his waiver application on the basis of his conviction, the BIA correctly stated that "[t]here is no requirement that the respondent be given notice of a ground which may bar him from relief." (DE # 20, Exh. H., p.2); *see also Aalund v. Marshall*, 461 F.2d 710, 712 (5th Cir. 1972).

## RECOMMENDATION

In accordance with the foregoing, the undersigned **RESPECTFULLY RECOMMENDS** that the Petitioner Carlos Pradilla's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Declaratory and Injunctive Relief (DE # 1, 2/19/04) be **DENIED** and the case dismissed. The parties have ten (10) days from the date of receipt of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable James Lawrence King, United States District Court Judge. Failure to file timely objections shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F. 2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988); *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F. 2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY SUBMITTED, in Chambers, at Miami, Florida, this 17 day of February, 2005.

/s/ [Illegible]
JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

Copies provided to:
U.S. District Judge King
All counsel of record

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**MIAMI, FLORIDA**

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| **FILE NO.: A71-552-475** | **IN DEPORTATION PROCEEDINGS** |
| **IN THE MATTER OF:** | |
| **PRADILLA-VILLAVECES, Carlos** | **DATE:** December 14, 2001 |
| **Respondent** | |

CHARGES: Section 241(a)(2)(B)(i) of the Immigration and Nationality Act – Convicted of Violating a Law Relating to a Controlled Substance.

Section 241(a)(1)(A) of the Immigration and Nationality Act – Excludable at Time of Entry.

Section 241(a)(1)(B)[1] of the Immigration and Nationality Act: Overstay of Nonimmigrant Visa.

APPLICATIONS: Section 244(a)(1) of the Immigration and Nationality Act – Suspension of Deportation.

[1] The Service charged Respondent with this provision under the Immigration and Nationality Act in the Order to Show Cause. The Court notes, however, that the provision regarding nonimmigrants who overstay their visas is section 241(a)(1)(C) of the Immigration and Nationality Act. In this order, the Court will continue to refer to section 241(a)(1)(B) of the Immigration and Nationality Act as the provision under which Respondent was charged.

Section 212(h) of the Immigration and Nationality Act – Waiver of Ground of Excludability.

Section 245 of the Immigration and Nationality Act – Adjustment of Status.

**ON BEHALF OF RESPONDENT:**
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**ON BEHALF OF THE SERVICE:**
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## DECISION AND ORDER OF THE IMMIGRATION JUDGE

The following information is derived from the Order to Show Cause ("OSC"), oral and written arguments presented by counsel to the Court, a Grand Jury Indictment from the United States District Court for the Central District of California ("Indictment"), the plea agreement into which Respondent entered in response to the Indictment, a transcript thereof, and a Judgment In a Criminal Case detailing Respondent's plea of guilty to Count One of the aforementioned Indictment, including sentencing information.

## PROCEDURAL HISTORY

Respondent is a forty-eight-year-old male, native and citizen of Colombia. He entered the United States at Miami, Florida, on or about December 3, 1985, as a B-2 nonimmigrant authorized to remain in the United States until June 2, 1986. Respondent remained in the United

States beyond such date without authorization from the Immigration and Naturalization Service ("Service").

By superseding[2] OSC issued on July 3, 1992, the Service charged Respondent with deportability pursuant to section 241(a)(2)(B)(i) of the Immigration and Nationality Act ("Act"), as an alien who has been convicted of a violation of (or a conspiracy to violate) any law relating to a controlled substance; pursuant to section 241(a)(1)(A) of the Act as an alien who, at the time of entry, was excludable under section 212(a)(2)(C) of the Act as an alien a consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any controlled substance;[3] and pursuant to section 241(a)(1)(B) of the Act as an alien who, after admission as a nonimmigrant, remained in the United States for a time longer than permitted.

At a master calendar hearing on January 27, 1995, Respondent, through first counsel, admitted the charges in the OSC and conceded deportability. At that time, Respondent requested relief in the form of suspension of deportation ("Suspension") pursuant to section 244(a) of the Act, and, in the alternative, voluntary departure pursuant to section 244(e) of the Act. The Service objected, arguing that the factual allegations in the OSC, and Respondent's admissions thereto, rendered Respondent ineligible for both Suspension and voluntary departure. The Court noted the Service's objection, but allowed Respondent sufficient time to file the aforementioned applications,

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[2] The prior OSC is not included in the Record of Proceeding.

[3] The Court will refer to this provision of law as the "reason to believe" provision.

setting a trial date for April 11, 1996. The Service then introduced into evidence, for purposes of identification, certified copies of certain documents.[4] Respondent subsequently filed an application for Suspension on February 27, 1995.

On August 14, 1995, the Service filed a written motion to pretermit Respondent's application for Suspension, arguing that Respondent's conviction rendered him ineligible for such relief. The Service argued that Respondent's money laundering conviction 1) rendered him an aggravated felon, and 2) placed him within the purview of section 212(a)(2)(C) of the Act, to wit: an alien an immigration officer knows or has reason to believe has been involved in the trafficking of a controlled substance. *See* INA §§101(f); §244(a)(1). Thus, the Service submitted, Respondent was proscribed from establishing that he was a person of good moral character. *Id.* The Court granted the Service's motion on August 21, 1995.

On May 14, 1996, the Department of Labor approved an Application for Alien Employment Certification, Form ETA-750, regarding an offer of employment made to Respondent by Spray Control Systems, Inc., ("SCS"). Subsequently, on December 1, 1996, SCS filed an Immigrant, Petition for Alien Worker, Form I-140, on Respondent's behalf.[5]

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[4] Although the record is unclear as to which documents the Service presented to the Court, the documents referred to appear to be 1) a Judgment in a Criminal Case against Respondent, convicting him of conspiracy to defraud the United States, dated July 12, 1991, *see* 18 U.S.C. §371; and 2) the Indictment charging Respondent with the aforementioned crime, as well as several other crimes, dated November 1981.

[5] SCS's Form I-140 was later approved on May 15, 1998. *See* footnote 7, *infra*.

On December 27, 1996, Respondent filed a Form I-485 application for Adjustment of Status ("Adjustment"). *See* INA §245(a). Subsequently, on December 31, 1996, Respondent filed a motion to either conditionally terminate or administratively close the deportation proceedings pending the Service's review of Respondent's Adjustment application. In the alternative, Respondent sought reconsideration of Respondent's Suspension application.

On January 9, 1997, the Service renewed its motion to pretermit Respondent's Suspension application based on the new provisions enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[6] The Service argued that the date of the OSC rendered Respondent statutorily ineligible for Suspension, as he was unable to meet the seven-year residency requirement mandated by section 244(a)(1) of the Act. *See also* INA §240A(d)(1) (implementing the "stop-time" rule).[7]

On February 14, 1997, the Service filed a response opposing Respondent's motion seeking termination of proceedings. The Service argued that the Court lacked authority to terminate the proceedings. 8 C.F.R. §§242.7(e) (1997), 245.2(a); *Matter of Rousis*, 18 I&N Dec. 256 (BIA 1982). The Service also argued that Respondent was ineligible for Adjustment because he was excludable under section 212(a)(2)(C) of the Act, which prevented Respondent from establishing his admissibility and thus his eligibility, for Adjustment. INA §245(a); *see also* INA

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[6] For a statement of the changes in the law implemented by IIRIRA, see *infra*, text Discussion, subsection A.

[7] The Court granted the motion on March 21, 1997. The Service renewed its argument opposing Respondent's eligibility for Suspension in its February 14, 1997, motion.

§241(a)(I)(A). The Court granted the Service's motion on March 5, 1997. At this time, due to a clerical error, the proceedings, in the instant case were terminated. The Service moved to reinstate proceedings on September 2, 1997, on the basis that the Court never issued an order terminating proceedings. Such motion was granted on October 21, 1997, and the case was rescheduled for a master calendar hearing.

At a master calendar hearing on June 26, 1998,[8] the Court directed Respondent and the Service to file written briefs detailing their arguments regarding Respondent's application for Adjustment. The Court also instructed the Service to file any other applicable charges against Respondent by August 10, 1998. As of November 18, 1998, the Service had not filed any additional charges. At that time, the Court reset the case and advised Respondent of the need to file an application for a waiver of inadmissibility; Respondent did so on February 26, 1999. *See* INA §212(h).

On February 2, 1999, the Service filed a motion to pretermit Respondent's Adjustment application, to which Respondent replied on March 2, 1999. At an individual merits hearing on July 26, 2000, the Court heard arguments regarding Respondent's eligibility for a 212(h) waiver.

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[8] The case was continued several times prior to this date to allow Respondent's new attorney to become familiarized with the case; in the interim, SCS's Form I-140, filed on Respondent's behalf, was approved on May 15, 1998.

## FACTS RELATING TO RESPONDENT'S CONVICTION

Respondent first entered the United States at Miami, Florida, in February of 1981. Between then and November of 1981, Respondent traveled to Los Angeles, California, on three different occasions, for business purposes. In November of 1981, Respondent was named as one of twenty-two defendants in the Indictment, which contained a total of thirty-five counts. Respondent was charged as follows:

In Count One of the Indictment, Respondent was charged with violating section 371 of Title 18 of the United States Code ("Code") for Conspiracy to Defraud the United States (Money Laundering), specifically: knowingly causing financial institutions to fail to file currency transaction reports for currency transactions involving $10,000 or more, knowingly and willfully failing to file such reports, traveling in interstate and foreign commerce with the intent to distribute the proceeds of narcotic activity, and obstructing lawful government functions relating to currency transactions.

Respondent was charged in Counts Two and Three of the Indictment with violating section 846 of Title 21 of the Code, which details that an attempt or conspiracy to commit an offense renders the actor liable for the offense itself. Count Three also charged Respondent with distributing the proceeds derived from narcotics and controlled substances activities with the intent to so distribute. 18 U.S.C. § 1952. Count Four of the Indictment charged Respondent with unlawfully manufacturing, distributing, or possessing, with intent to manufacture, distribute or dispense, a controlled substance. 21 U.S.C. §841. Respondent was also charged under Count Four with a violation of section 2 of Title 18 of the Code, which provides that

anyone who commits an offense against the United States or aids or abets its commission is punishable as a principal.

In 1982, Respondent returned to Colombia before he could be apprehended for the aforementioned crimes. He returned to the United States in December of 1985, remaining until the present time. On February 17, 1991, pursuant to a warrant issued in 1982, Respondent was arrested. Respondent subsequently negotiated a plea agreement with the United States Government ("Government") on April 3, 1991, in which Respondent pled guilty to Count One of the Indictment. In exchange, the Government agreed to dismiss the remaining charges against Respondent.

In the course of the district court's acceptance of the plea agreement, Respondent acknowledged that the conspiracy in which he was involved had access to currency derived from the sale of cocaine. Such currency was transacted through different financial institutions for the purpose of defrauding the Government. Respondent admitted that other members of the conspiracy had entered into an illegal agreement with certain financial institutions in which those institutions failed to file required reports with the Department of the Treasury. Respondent, knowing the purpose for which the currency was transferred, divulged that his role in the conspiracy involved obtaining or delivering the currency to these financial institutions for the aforementioned purpose.

Respondent was sentenced to a term of probation for a period of three years, and fined in the amount of $1,000.

## DISCUSSION

### A. Suspension of Deportation

#### 1. Applicable Law

When the Service commenced proceedings against Respondent in 1992, Suspension was governed by section 244(a) of the Act. Since then, IIRIRA replaced section 244(a)(1) of the Act with section 240A(b) of the Act, which provides for cancellation of removal for nonpermanent residents. IIRIRA §304(a), Pub. L. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996), *amended* by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996). The Code of Federal Regulations details that former section 244(a) of the Act applies to suspension of deportation cases regarding

> deportation proceedings commenced prior to April 1, 1997. A deportation proceeding is commenced by the filing of Form 1-221 (Order to Show Cause) with the Immigration Court, and an alien is considered to be in deportation proceedings only upon such a filing. . . .
>
> 8 C.F.R. §240.55.

In the instant case, the OSC was filed with the Court, and hence deportation proceedings against Respondent commenced, on July 3, 1992. Therefore, Respondent is eligible to seek relief in the form of Suspension pursuant to former section 244(a) of the Act.

Section 244(a)(1) of the Act provides that an applicant for Suspension who is deportable under any law of the United States, except as otherwise provided, must establish: 1) physical presence in the United States for a continuous period of not less than seven years immediately preceding the date of application; 2) good moral character

during all of such period; and 3) that deportation would result in extreme hardship to himself, or to his spouse, parent, or child who is a United States citizen or lawful permanent resident. INA §244(a)(1). In addition to the statutory requirements, the applicant must show that he merits Suspension as a matter of discretion. INA §244(a); *see also Matter of 0-J-0-*, 21 I&N Dec. 381 (BIA 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996).

**2. Arguments**

Respondent argued that his 1991 conviction referred to acts that occurred in 1981. According to Respondent, at the time the acts for which he was convicted occurred, they were not aggravated felonies, and Respondent was therefore eligible to apply for Suspension.

The Service argued that Respondent's conviction constituted an aggravated felony as that term is defined in section 101(a)(43) of the Act, and therefore rendered him ineligible for Suspension. Section 101(f)(8) of the Act established that a person who has been convicted of an aggravated felony was precluded from establishing good moral character. INA §101(f) (1995). Since good moral character is a required element for establishing eligibility for Suspension, the Service proposed, Respondent's conviction, an aggravated felony, rendered him ineligible for Suspension. INA §244(a)(1).[9]

[9] *See infra* footnote 11.

### 3. Continuous Physical Presence

Continuous physical presence must be established during the seven years immediately preceding the date of the Suspension application. INA §244(a)(1). Prior to IIRIRA, the time an alien spent in deportation proceedings counted towards the physical presence requirement. However, IIRIRA enacted a "stop-time" provision, which provided that an alien's time toward the physical presence requirement stops accruing, and therefore his physical presence is deemed to end, when the alien is served with a notice to appear ("NTA") or commits a criminal offense described in section 240A(d)(1) of the Act. *See* IIRIRA §304(a)(3) (enacting INA §240A(d)(1)). Under IIRIRA's Transitional Rule With Regard to Suspension of Deportation, the stop-time rule applies to NTAs issued before, on, or after April 1, 1997. IIRIRA §309(c)(5). Subsequently, the Nicaraguan Adjustment and Central American Relief Act ("NACARA") amended IIRIRA's Transitional Rules With Regard to Suspension of Deportation such that the stop-time rule applies to OSCs issued before, on, or after the dates of the enactment of the Act. NACARA § 203(a), District of Columbia Appropriations Act, Pub. L. No. 105-100, 111 Stat. 2160 (Nov. 19, 1997). *See Matter of Nolasco*, Int. Dec. 3385 (BIA 1999) (Section 203(a) of NACARA codified the majority decision in *Matter of N-J-B*, Int. Dec. 3415 (BIA, A.G. 1997), by providing that OSCs had the same "stop time" effect as NTAs); *see also Matter of Mendoza-Sandino*, Int. Dec. 3426 (BIA 2000).

Therefore, based on the aforementioned legislation and the Board of Immigration Appeals' ("BIA") interpretation thereof, the stop-time rule applies to Respondent's case. Respondent's time toward the physical presence requirement stopped accruing on July 3, 1992, when he

was served with the OSC. Respondent's last entry into the United States before the issuance of the OSC was on December 3, 1985. Respondent's accrued time of physical presence in the United States for Suspension purposes, from December 3, 1985, through July 3, 1992, is six and one-half years. Consequently, Respondent has not accrued the required seven years of continuous physical presence in the United States and is therefore statutorily ineligible for Suspension. *See* INA 240A(d)(1). For the foregoing reasons, the Court need not reach the issues of good moral character, extreme hardship, or administrative discretion.

## B. Waiver Pursuant to Section 212(h) of the Act

### 1. Applicable Law

Section 212(h) of the Act provides for a waiver of several grounds of inadmissibility, including section 212(a)(2)(A)(i)(II) (violation of any law relating to a controlled substance) insofar as it relates to a single offense of simple possession of 30 grants or less of marijuana, and section 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude). To be statutorily eligible for a waiver under section 212(h) of the Act, the alien must establish that he is the spouse, parent, or son of a United States citizen or an alien admitted for permanent residence. INA § 212(h)(1)(B). The alien must then establish that his removal from the United States would result in extreme hardship to a qualifying relative. *Id.* No such waiver is available to a lawful permanent resident who has either been convicted of an aggravated felony or has not resided continuously in the United States for a period of not less than seven years immediately preceding the date of the initiation of proceedings. *Id.* Finally, should the alien establish that he is statutorily eligible for a waiver under

section 212(h) of the Act, he must also demonstrate that he merits such relief as a matter of discretion. *Id.*

Section 212(h) of the Act contains no provision waiving a charge under either the section 212(a)(2)(C) "reason to believe" provision or section 241(a)(2)(B)(i) of the Act (conviction of a law relating to a controlled substance), except as it regards a single conviction for possession of thirty grams or less of marijuana. Thus, if Respondent's conviction for conspiracy is classified as either a controlled substance offense, or an offense which rendered Respondent excludable at the time of his entry under the "reason to believe" provision, then no waiver is available to Respondent under section 212(h) of the Act. *See* 18 U.S.C. §371.

**2. Arguments**

Respondent first argued that he was not provided notice regarding the charges filed against him. He based this charge on the Service's indication, in a 1997 brief, that it was withdrawing the charges levied against Respondent pursuant to sections 241(a)(1)(B)(i) and 241(a)(1)(A) of the Act. Respondent also submitted that he was not convicted for violating a law relating to a controlled substance; he asserted that the charges against him relating to narcotics were dismissed pursuant to the plea agreement with the Government. Further, Respondent cited as controlling the holding in *Matter of Rico*, 16 I&N Dec. 181, 184 (BIA 1977), which established that an alien is excludable if, at the time of entry, the immigration officer knows or has reason to believe that the alien has been an illicit trafficker in drugs. However, Respondent alleged that his situation was factually distinguishable from *Rico* and thus

the holding of *Rico* should not apply to his case. Respondent also proffered the claim that his conviction did not render him an aggravated felon on the ground that a money laundering offense had to be committed on or after November 29, 1990 in order to be classified as an aggravated felony under the Act. See *Matter of A-A-*, 20 I&N Dec. 492 (BIA 1992).

The Service argued that Respondent's conviction was for aiding and abetting a conspiracy whose object was to launder money derived from the illegal sale of narcotics. The Service argued that Respondent's conviction amounted to a drug-trafficking crime that rendered him inadmissible pursuant to section 212(a)(2)(C) of the Act, as well as an aggravated felon. *See* INA §101(a)(43)(D). Therefore, the Service argued, Respondent is not eligible for a waiver pursuant to section 212(h) of the Act because of his status as an aggravated felon and the unavailability of such a waiver to an alien found inadmissible pursuant to section 212(a)(2)(C) of the Act.

### 3. Charge pursuant to Section 241(a)(2)(B)(i) of the Act

Respondent was convicted in federal court of the crime of conspiracy. *See* 18 U.S.C. §371. He was charged in Count Three of the Indictment with traveling in interstate and foreign commerce with the intent to distribute, and thereafter distributing, the proceeds of unlawful narcotics and controlled substances activities. In *Matter of N-*, 6 I&N Dec. 557 (BIA, A.G. 1955), the Attorney General adjudged that a conviction for conspiracy in violation of section 371 of Title 18 of the Code constituted a violation of section 241(a)(11) of the Act and thus rendered the alien

deportable. INA §241(a)(11) (1955). That provision rendered deportable any alien who "at any time has been convicted of a violation of any law or regulation *relating to* the illicit traffic in narcotic drugs." INA §241(a)(11) (1955). (Emphasis added). Section 241(a)(2)(B)(i) of the Act, under which Respondent is charged, provided for the deportation of any alien who "has been convicted of a violation of (or a conspiracy or attempt to violate) any law . . . *relating to* a controlled substance." INA §241(a)(2)(B)(i) (1995). (Emphasis added). Section 241(a)(11) was superseded by section 241(a)(2)(B)(i) of the Act. *Matter of Batista-Hernandez*, 21 I&N Dec. 955, 958 (BIA 1997).

*Matter of N-* was decided on the premise that the controlling phrase in section 241(a)(11) of the Act is "relating to." *Matter of N-*, *supra* at 561. The Attorney General determined that such phrase "[o]n its face is broad enough to cover a conviction for conspiracy to violate the narcotic laws." *Id.* Thus, although the language of the two provisions is dissimilar in that the former constituted a charge for illicit drug trafficking, while the latter does not include a specific illicit trafficking provision, the charges are nonetheless congruent because they contain the pivotal phrase "relating to." *See also Matter of Beltran*, 20 I&N Dec. 521, 526 (BIA 1992).

The facts of *Matter of N-* are also germane to the instant case. Both respondents were convicted of a violation of the same federal statute. *See* 18 U.S.C. §371. In the indictments, both were charged with, but not specifically convicted of, violations involving the transportation of narcotic drugs into the United States in contravention of law. *See Matter of N-, supra,* at 557-8. The factual and legal parallels between the instant case and *Matter of N-* lead to the conclusion that Respondent's conviction for

conspiracy based on an underlying charge of traveling in interstate and foreign commerce with the intent to distribute, and thereafter distributing, the proceeds of unlawful narcotics and controlled substances activities constituted a violation of a law relating to a controlled substance. Thus, Respondent is deportable pursuant to section 241(a)(2)(B)(i) of the Act as an alien convicted of violating a law relating to a controlled substances. Hence, no waiver of inadmissibility is available to him. *See* INA §212(h).

Although the unavailability of relief regarding this charge renders Respondent deportable without relief the Court will continue the analysis regarding the other charge against Respondent.

**4. Charge pursuant to Section 241(a)(1A) of the Act**

Respondent was charged as deportable from the United States, to wit: excludable at the time he entered the United States under the "reason to believe" provision. INA §241(a)(1)(A) (1995); *See also* INA §212(a)(2)(C) (1995). Respondent first entered the United States in February of 1981. He was indicted for the aforementioned crimes in November of 1981. Respondent returned to and entered the United States in December of 1985. Respondent argued that he was not convicted of a controlled substance offense because the law under which he was convicted for conspiracy did not include a specific provision regarding controlled substances.

Respondent acknowledged that *Rico* provided the controlling law in this situation, to wit: "a criminal conviction is unnecessary to establish a basis for exclusion under

[section 212(a)(2)(C) of the Act]." *Matter of Rico,* 16 I&N Dec. 181, 184 (BIA 1977). Indeed, *Rico* provided that even if a criminal complaint against an alien is dismissed, he may still be excluded under the "reason to believe" provision. *Id.*; *see, also Castano v. INS*, 956 F.2d 236 (11th Cir. 1992) (affirming BIA ruling that denial of admission pursuant to section 212(a)(23)[10] of the Act may be based on the facts underlying an expunged conviction).

Nonetheless, Respondent asserted that the case at bar was factually distinguishable from *Rico*. His argument was based on two distinctions: first, the alien in *Rico* admitted having imported drugs into the United States, and second, the immigration officers found a large quantity of drugs in the alien's automobile at the time of his entry. Respondent contended that his own involvement in the money laundering scheme that led to his conviction was minimal; he further asserted that he was not initially aware that a larger drug trafficking scheme was in operation when he first became involved in the conspiracy. Respondent contended that the amount of evidence available to the immigration officer in *Rico*, and on which such officer was found to have a reason to believe that the respondent was involved in the illicit trafficking of drugs, was greater than the amount of evidence available to an immigration officer in the instant case. Respondent based this argument on his conspiracy conviction as well as Count One of the Indictment, neither of which made mention of narcotics or other controlled substances, *See* 18 U.S.C. §371. Thus, Respondent asserted, *Rico* should not apply in the instant case. The Court disagrees.

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[10] Section 212(a)(23) of the Act is a precursor of the current "reason to believe" drug trafficking provision.

In *Rico*, the immigration officer and the BIA based their findings of excludability on the respondent's own assertions regarding his transporting of drugs. *Matter of Rico*, *supra* at 186. In the instant case, Respondent admitted the factual allegations contained in Count One of the Indictment in the plea agreement he negotiated regarding his crime and his subsequent sentencing thereto. Respondent acknowledged his membership in a conspiracy that provided money laundering services for major narcotics traffickers. Further, as indicated in the Court's discussion above, Respondent's conviction was properly characterized as a violation of a law relating to a controlled substance based on the charge levied against Respondent in Count Three of the Indictment. *See supra*, text pp. 12-13.

The information contained in the Indictment in 1981 would have been available to an immigration officer in 1985 when Respondent again presented himself for admission to the United States. See INA 287(b) (immigration officer possesses authority to consider evidence concerning any matter which is material or relevant regarding the alien's admissibility); *see also* 8 C.F.R. §287.5(a)(2). Respondent argued that the information contained in Counts Two, Three and Four of the Indictment could not have been considered by the immigration officer because Respondent was not convicted of these charges which were, in fact, dismissed by the Government.

However, the BIA has determined that even where an alien's conviction does not include a finding of illicit trafficking in drugs, the alien may still be excluded based on that conviction pursuant to the 'reason to believe" provision. *Matter of Favela,* 16 I&N Dec. 753, 756 (BIA 1979). In *Favela* the alien was charged pursuant to section 212(a)(23) of the Act, a provision that closely parallels the

language of the charge presently levied against Respondent. See INA §§212(a)(2)(C) and 241(a)(1)(A). In that case, the alien's conviction did not include a finding of illicit trafficking in drugs; rather, the conviction was for entering goods by false statements. *Matter of Favela, supra*, at 756; *see also* 18 U.S.C. §542. Nonetheless, the BIA held that the alien was excludable on the basis that his conviction satisfied the "reason to believe" provision because the alien had admitted to participating in an attempt to smuggle drugs into the United States. *Matter of Favela, supra*, at 456.

Similarly, in the instant case, Respondent's conviction did not include a finding that Respondent was an illicit drug trafficker. Nonetheless, the information set forth in the Indictment, along with the Respondent's admissions thereto, provide a basis for concluding that Respondent had been a conspirator with others in the illicit trafficking of a controlled substance. Thus, Respondent's conviction for conspiracy renders him deportable from the United States on the ground that he was excludable at the time of his entry in 1985 as an alien an immigration officer had reason to believe was either an illicit drug trafficker, or involved in a conspiracy therewith.

Therefore, Respondent is ineligible for a waiver of inadmissibility pursuant to section 212(h) of the Act because this form of relief does not waive a charge of excludability based on section 212(a)(2)(C) of the Act. INA §212(h); INA §241(a)(1)(A) (alien is deportable if excludable at time of entry).

## C. Adjustment of Status

Section 245(a) of the Act provides that the status of an alien who was inspected and admitted or paroled into the United States may be adjusted to that of an alien lawfully admitted for permanent residence if 1) the alien applies for such adjustment; 2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and 3) an immigrant visa is immediately available to him at the time his application is filed. To determine whether a visa is immediately available, the current Visa bulletin prepared by the Department of State must be consulted. 8 C.F.R. §245.1(g). The visa is considered available if the Bulletin shows that numbers for visa applicants in the applicant's category are current. *Id.* The alien must also demonstrate that he merits adjustment of status to that of lawful permanent resident as a matter of discretion. *Id.*

Inasmuch as the Court has found Respondent ineligible for a waiver of inadmissibility pursuant to section 212(h) of the Act, Respondent is ineligible to adjust his status to that of a lawful permanent resident pursuant to section 245 of the Act because he is not admissible to the United States. Consequently, the Court need not address any further issues.[11]

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[11] Regarding the Respondent's and Service's arguments regarding whether Respondent's conviction is properly classified as an aggravated felony, the Court notes that *Lettman v. Reno*, 207 F.2d 1368, 1370 (11th Cir. 2000), held that an alien is deportable if he is convicted of an aggravated felony at any time after entry. *See* INA §241(a)(2)(A)(iii). Since Respondent is ineligible for Suspension because he does not meet the seven-year physical presence requirement, and he is also ineligible for a waiver of inadmissibility pursuant to section 212(h) of the Act because there is no waiver for the charges lodged against him, the

(Continued on following page)

## CONCLUSION

Respondent does not qualify for a waiver of inadmissibility under section 212(h) of the Act. Therefore, he is ineligible to adjust his status pursuant to section 245 of the Act.

In light of the foregoing, and after careful consideration of all of the evidence of record, the following orders will be entered:

## *ORDERS*

**WHEREFORE IT IS HEREBY ORDERED** that Respondent is **DEPORTABLE** as charged under sections 241(a)(2)(B)(i), 241(a)(1)(A), and 241 (a)(1)(B) of the Act.

**IT IS HEREBY FURTHER ORDERED** that Respondent's application for a waiver of inadmissibility pursuant to section 212(h) of the Act is **DENIED**.

**IT IS FURTHER ORDERED** that Respondent's application for suspension of deportation pursuant to section 244(a)(1) of the Act is **DENIED**.

**IT IS FURTHER ORDERED** that Respondent's application for adjustment of status pursuant to section 245 of the Act is also **DENIED**.

**IT IS HEREBY FURTHER ORDERED** that Respondent be **DEPORTED** to Colombia.

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Court need not decide at this time whether Respondent's conviction rendered him an aggravated felon pursuant to section 101(a)(43) of the Act.

Dated this 14th day of December, 2001.

/s/ KEVIN G. BRADLEY
Honorable Kevin G. Bradley
UNITED STATES
IMMIGRATION JUDGE

KGB/mmo

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 05-13130-HH

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CARLOS PRADILLA,

Petitioner-Appellant,

versus

ALBERTO GONZALES,
MICHAEL CHERTOFF,
Secretary, Department of Homeland Security,

Respondents-Appellees.

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On Appeal from the United States District Court
for the Southern District of Florida

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(Filed Oct. 5, 2006)

Before: ANDERSON, FAY and SILER*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Eighth Circuit, sitting by designation.

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
UNITED STATES CIRCUIT
JUDGE

FILED
MAR 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-906

# In the Supreme Court of the United States

CARLOS PRADILLA, PETITIONER

*v.*

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals erroneously failed to employ the "categorical" approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), in deciding whether petitioner was convicted of violating a law "relating to a controlled substance," 8 U.S.C. 1182(a)(2)(A)(i)(II), such that he was ineligible for a discretionary waiver of inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. 1182(h).

2. Whether, in cases in which *Taylor*'s "categorical" approach is employed, the government must establish that the alien's conviction is a basis for removability by proof beyond a reasonable doubt or by clear and convincing evidence.

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# In the Supreme Court of the United States

No. 06-906

CARLOS PRADILLA, PETITIONER

*v.*

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter* but is reprinted at 187 Fed. Appx. 959. The order of the district court (Pet. App. 8-9) and the report and recommendation of the magistrate judge (Pet. App. 10-40) are unreported. The decision of the Board of Immigration Appeals (Pet. App. 5-7) is not published in the *Administrative Decisions Under Immigration & Nationality Laws* but is available at 2004 WL 1167271. The decision of the immigration judge (Pet. App. 41-62) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 5, 2006. A petition for rehearing was denied on October 5, 2006 (Pet. App. 63-64). The petition for a writ

of certiorari was filed on January 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Under Section 245 of the Immigration and Nationality Act (INA), an alien is eligible to adjust his status to that of a lawful permanent resident if three requirements are satisfied: (1) the alien must make an application for such adjustment; (2) the alien must be eligible to receive an immigrant visa and "admissible to the United States for permanent residence"; and (3) an immigrant visa must be immediately available to the alien at the time his application is filed. 8 U.S.C. 1255(a). An alien requesting adjustment of status assimilates himself to the position of an alien outside the United States seeking entry as an immigrant, and thus the question of admissibility is evaluated as of the date of the application for adjustment of status. Pet. App. 30 (citing cases).

Under Section 212(a) of the INA, 8 U.S.C. 1182(a), several classes of aliens are ineligible for admission to the United States. One such class is those who have been convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1182(a)(2)(A)(i)(II). An alien is also ineligible for admission under Section 212(a) if consular or immigration officials know or have reason to believe that the alien "is or has been an illicit trafficker in any controlled substance"; "is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled * * * substance"; or "endeavored to do so." 8 U.S.C. 1182(a)(2)(C)(i).

Under Section 212(h) of the INA, a discretionary waiver of inadmissibility is available to certain classes of inadmissible aliens, including aliens convicted of violating a law relating to a controlled substance "insofar as [the conviction] relates to a single offense of simple possession of 30 grams or less of marijuana." 8 U.S.C. 1182(h). An alien convicted of violating a law "relating to a controlled substance" that does not relate to a single marijuana offense of that type, however, is not eligible for a discretionary waiver of inadmissibility under Section 212(h). Nor is an alien who has been an "illicit trafficker" (or aider or abettor or co-conspirator of an "illicit trafficker") in a controlled substance.

2. Petitioner is a native and citizen of Colombia. In February 1981, he entered the United States at Miami, Florida, on a tourist visa. Between February and November 1981, he traveled from Miami to Los Angeles, California, on three occasions. Pet. App. 11-12, 42, 47.

In July 1982, a grand jury in the Central District of California returned a 35-count indictment against petitioner and 21 others. Pet. Mot. for T.R.O. & Prelim. Inj. Exh. I, Indictment (Indictment). Count One of the indictment charged a conspiracy in violation of 18 U.S.C. 371, which makes it a crime to "conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner of for any purpose." Indictment 2-18. In particular, Count One charged that petitioner and others conspired (a) to fail to file currency transaction reports for transactions involving $10,000 or more, (b) to cause financial institutions to fail to file currency transaction reports for such transactions, (c) to use facilities in interstate commerce with the intent to distribute the proceeds of narcotics trafficking, and (d) to defraud the Internal

Revenue Service. *Id.* at 2-4. In describing the means by which th objects of the conspiracy were accomplished, Count C alleged that the defendants collectively "provided a money laundering service involving currency deposits and wire transfers for major narcotics traffickers who derived large quantities of United States currency from sales of cocaine" (*id.* at 4-5) and that petitioner individually "collected and transferred, and caused the collection and transfer, of currency to [other] defendants" (*id.* at 7). The indictment also charged petitioner with two counts of conspiracy to possess with intent to distribute and to distribute cocaine, in violation of 21 U.S.C. 846 (Counts Two and Three), and one count of aiding and abetting possession with intent to distribute cocaine, in violation of 21 U.S.C. 841 and 18 U.S.C. 2 (Count Four). Indictment 19-27.

At some point in 1982, petitioner returned to Colombia. On December 3, 1985, he again entered the United States at Miami, as a B-2 nonimmigrant visitor authorized to stay in the country until June 2, 1986. He remained in the United States beyond that date, however. In February 1991, he was arrested on a warrant. Pet. App. 11, 14, 42, 48.

In May 1991, petitioner pleaded guilty to Count One of the indictment. Pet. Mot. for T.R.O. & Prelim. Inj. Exh. I, Plea Tr. (Plea Tr.). At the plea proceeding, the district court asked the prosecutor what the evidence would show if the case were to go to trial. *Id.* at 5. In response, the prosecutor stated that the evidence would show that "other members of the conspiracy had access to large amounts of currency, which was derived from the sale of cocaine"; that petitioner "would take, deliver or transfer currency at the direction of others in the conspiracy to financial institutions"; and that, "[p]rior to

the delivery of the money to the banks, certain co-conspirators of [petitioner] had made an illegal agreement with the financial institutions to fail to file the necessary reports with the Department of Treasury." *Id.* at 6. The prosecutor added that petitioner "knew that the money was being transported for this purpose and knew that it was against the law." *Ibid.* The district court then asked petitioner whether he agreed with the facts that the prosecutor had stated. *Ibid.* Petitioner answered "[y]es." *Ibid.*

The district court sentenced petitioner to three years of probation and a fine of $1000. Pet. App. 14, 48.

3. a. In June 1992, the Immigration and Naturalization Service (INS) instituted deportation proceedings against petitioner. Pet. App. 15, 43.* It initially alleged that petitioner was deportable on three grounds: (1) that he had been convicted of a crime relating to a controlled substance (see 8 U.S.C. 1227(a)(2)(B)(i)); (2) that he was excludable at the time of entry as an alien that a consular or immigration official knew or had reason to know had been an illicit trafficker in a controlled substance (see 8 U.S.C. 1182(a)(2)(C)(i), 1227(a)(1)(A)); and (3) that he was present in the United States in violation of law because he had remained in the country beyond the time authorized (see 8 U.S.C. 1227(a)(1)(B)). Pet. App. 15-16, 43. The INS subsequently withdrew the first and second charges of deportability. *Id.* at 16. Petitioner conceded that he was deportable but applied for suspension of deportation under former Section 244(a)(1) of the INA (see 8 U.S.C.

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* The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

1254(a)(1) (1994)). Pet. App. 16, 43. Later, after the Department of Labor granted his application for a labor certification, petitioner filed an application for adjustment of status. *Id.* at 16, 44. He also filed an application for a waiver of inadmissibility under Section 212(h) of the INA. *Id.* at 17, 46.

b. The immigration judge (IJ) ruled that petitioner was deportable on all three of the grounds initially alleged by the INS; denied his applications for suspension of deportation, waiver of inadmissibility, and adjustment of status; and ordered him deported to Colombia. Pet. App. 41-62. The IJ held that petitioner was ineligible for suspension of deportation because he could not satisfy the statutory requirement of continuous physical presence in the United States for seven years. *Id.* at 49-52; see 8 U.S.C. 1254(a)(1) (1994). The IJ held that petitioner was ineligible for a waiver of inadmissibility on two independent grounds: he had been convicted of a violation of a law "relating to a controlled substance" (and he was therefore inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(II)); and there was reason to believe that he was an "illicit trafficker" in a controlled substance or a co-conspirator of an "illicit trafficker" (and he was therefore inadmissible under 8 U.S.C. 1182(a)(2)(C)(i)). Pet. App. 52-59. With respect to the former ground, the IJ reasoned that petitioner's "conviction for conspiracy" was "based on an underlying charge of traveling in interstate and foreign commerce with the intent to distribute, and thereafter distributing, the proceeds of unlawful narcotics and controlled substances activities." *Id.* at 55-56. With respect to the latter ground, the IJ reasoned that, even though petitioner's "conviction does not include a finding of illicit trafficking in drugs," the indictment and guilty plea

"provide a basis for concluding that [petitioner] had been a conspirator with others in the illicit trafficking of a controlled substance," and thus there was "reason to believe [that petitioner] was either an illicit drug trafficker[] or involved in a conspiracy therewith." *Id.* at 58-59. Finally, the IJ held that petitioner was ineligible to adjust his status because he was ineligible for a waiver of inadmissibility and therefore could not satisfy the statutory requirement that he be admissible to the United States. *Id.* at 60.

c. Petitioner appealed to the Board of Immigration Appeals (BIA), which sustained the appeal in part and dismissed it in part. Pet. App. 5-7. The BIA held that the IJ erred in finding petitioner deportable on the grounds that had been withdrawn by the INS. *Id.* at 6. But it held that the IJ correctly found petitioner ineligible for a waiver of inadmissibility, because he had been convicted of an offense relating to controlled substances, and correctly found petitioner ineligible for suspension of deportation, because he was not continuously present in the United States for seven years. *Id.* at 6-7. The BIA did not reach the question whether petitioner was ineligible for a waiver of inadmissibility on the independent ground that there was reason to believe that he was an illicit trafficker in a controlled substance. *Ibid.*

4. Petitioner challenged the agency's decision in a petition for a writ of habeas corpus. The district court referred the petition to a magistrate judge for a report and recommendation.

a. The magistrate judge recommended that the petition be denied. Pet. App. 10-40. As relevant here, the magistrate judge concluded that the agency had correctly ruled that petitioner was ineligible for a waiver of inadmissibility, both because he had been convicted of a

violation of a law "relating to a controlled substance" and because there was reason to believe that he was an "illicit trafficker" in a controlled substance (or at least an aider and abettor or co-conspirator of an "illicit trafficker"). *Id.* at 25-37. With respect to the former ground, the magistrate judge reasoned that "[t]he allegations in Count I [of the indictment] demonstrate that the petitioner's conspiracy conviction is so closely related to the underlying drug offenses * * * as to be a conviction 'relating to' a controlled substance." *Id.* at 33-34. With respect to the latter ground, the magistrate judge reasoned that it was permissible to consider "not only the petitioner's conviction but 'credible evidence' that the petitioner has trafficked in drugs"; that "[s]uch evidence could include the other counts in the indictment and the petitioner's plea colloquy"; and that, "[o]n those bases," there was "reason to believe" that "the petitioner had been an illicit drug trafficker or at the very least a knowing assistor or conspirator in the illicit trafficking of drugs." *Id.* at 36 (quoting *Castano* v. *INS*, 956 F.2d 236, 238 (11th Cir. 1992)).

b. The district court overruled petitioner's objection to the magistrate judge's report and recommendation, adopted the report and recommendation, and entered an order denying the petition for a writ of habeas corpus. Pet. App. 8-9.

5. The court of appeals converted petitioner's habeas corpus petition into a petition for review and denied the petition in an unpublished per curiam opinion. Pet. App. 1-4; see REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106(a), 119 Stat. 311 (to be codified at 8 U.S.C. 1252(a)(5)) (providing that "a petition for review filed with an appropriate court of appeals * * * shall be the sole and exclusive means for judicial review

of an order of removal"). The court stated that "the petition is without merit for reasons fully discussed at oral argument." Pet. App. 4.

## ARGUMENT

1. Petitioner contends (Pet. 9-21) that the "categorical" approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), must be employed in deciding whether an alien has been convicted of violating a law "relating to a controlled substance," 8 U.S.C. 1182(a)(2)(A)(i)(II), such that the alien is ineligible for a discretionary waiver of inadmissibility under Section 212(h) of the INA, 8 U.S.C. 1182(h), and that the court of appeals did not employ that approach here. As explained below, it is not clear that *Taylor*'s "categorical" approach applies in this context; the agency and lower courts in any event applied it; they applied it correctly; there is no circuit conflict on the issue; and petitioner would not be entitled to relief even if his contention had merit. Further review is therefore unwarranted.

a. As this Court recently explained in *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815 (2007), "[i]n determining whether a conviction * * * falls within the scope of a listed offense" that "subjects certain aliens to removal from the United States," the courts "uniformly have applied the ['categorical'] approach this Court set forth in *Taylor*." *Id.* at 818. *Taylor* held that, when a court "seeks to determine whether a particular prior conviction" satisfies the applicable federal definition, "it should normally look not to the facts of the particular prior case, but rather to the * * * statute defining the crime of conviction." *Ibid.* (citing *Taylor*, 495 U.S. at 599-600). When the criminal statute "include[s] both a * * * listed crime and * * * one or more nonlisted

crimes," however, *Taylor* permits a court "to go beyond the mere fact of conviction" and determine whether the defendant was convicted of a listed or a nonlisted crime. *Id.* at 818-819 (quoting *Taylor*, 495 U.S. at 602). As the Court observed in *Duenas-Alvarez*, "some courts refer to this [second] step of the *Taylor* inquiry as a 'modified categorical approach.'" *Id.* at 819. In determining whether a defendant was convicted of a listed crime at the "modified categorical" step of the *Taylor* inquiry, courts are permitted to examine "the indictment or information and jury instructions" (if the defendant was convicted after a trial), *ibid.* (quoting *Taylor*, 495 U.S. at 602), and the "charging document," "plea agreement," "transcript of colloquy between judge and defendant," or "some comparable judicial record" of that information (if the defendant was convicted by guilty plea), *ibid.* (quoting *Shepard* v. *United States*, 544 U.S. 13, 26 (2005)). See also 8 U.S.C. 1229a(c)(3)(B) (listing "documents or records" constituting "proof of a criminal conviction").

*Taylor* was a criminal case, in which the prior convictions resulted in a higher sentence, see 18 U.S.C. 924(e), and there is reason to question whether its "categorical" approach must be applied, at least in the same way, in the deportation context. Recognizing that the *Taylor* methodology is informed, in part, by "constitutional concerns * * * emanat[ing] from the Sixth Amendment," at least one court of appeals has declined to "transplant the categorical approach root and branch—without any modification whatever—into the civil removal context." *Conteh* v. *Gonzales*, 461 F.3d 45, 55 (1st Cir. 2006), petition for cert. pending, No. 06-9829 (filed Jan. 8, 2007). Another court has indicated that "a departure from the formal categorical approach seems warranted" at least

in cases where "the terms of the statute invite inquiry into the facts underlying the conviction at issue." *Singh* v. *Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004) (Becker, J.). The BIA agrees. See *In re Gertsenshteyn*, 24 I. & N. Dec. 111, 112 (2007) (whether an offense relating to transportation for the purposes of prostitution was "committed for commercial advantage," such that it is an "aggravated felony" under 8 U.S.C. 1101(a)(43)(K)(ii), "may be proved by any evidence, including evidence outside the record of conviction").

Moreover, although petitioner may be correct that some version of "the 'categorical' or 'modified categorical' approach must be used in determining whether a crime committed by an alien is a deportable offense" (Pet. 8), this case does not present the question whether the crime of which petitioner was convicted is "a deportable offense." Petitioner was found to be deportable, not because of his conspiracy conviction, but because he had remained in the country beyond the time authorized. Pet. App. 5-7. Indeed, petitioner conceded that he was deportable on that ground. *Id.* at 16, 43. The issue in this case is whether petitioner's prior conviction renders him ineligible for a discretionary waiver of inadmissibility, not whether it renders him deportable. And it is not clear that *any* version of the "categorical" approach must be employed in deciding that issue.

b. Even assuming that the "categorical" approach employed in *Taylor* must also be employed in deciding whether an alien is ineligible for a discretionary waiver of inadmissibility by virtue of having been convicted of violating a law "relating to a controlled substance," no error occurred here, because no different approach was employed. Petitioner pleaded guilty to violating the

general conspiracy statute, 18 U.S.C. 371, which reaches both conduct that is related to a controlled substance and conduct that is not. Under the "modified categorical" approach, therefore, it was appropriate to consult the indictment and the transcript of the plea colloquy in deciding whether the conduct of which petitioner was convicted was related to a controlled substance. *Duenas-Alvarez*, 127 S. Ct. at 819; *Shepard*, 544 U.S. at 26. In deciding that it was, the IJ relied exclusively on those documents, Pet. App. 47-48, 54-56, and the BIA "agree[d] with the [IJ]," *id.* at 6. Likewise, in recommending that the district court deny petitioner's petition for a writ of habeas corpus challenging the agency's decision, the magistrate judge relied exclusively on the same documents, *id.* at 12-15, 31-34, and the district court adopted the magistrate judge's recommendation.

After converting the petition for a writ of habeas corpus into a petition for review, the court of appeals rejected all of petitioner's contentions without explanation. Pet. App. 4. There is no basis to conclude, however, that it relied on anything other than the indictment and plea colloquy in rejecting petitioner's contention that he had not been convicted of violating a law "relating to a controlled substance." Indeed, as far as that contention is concerned, there is no indication that the agency had any evidence before it other than the indictment, plea agreement, transcript of plea colloquy, and judgment of conviction, see *id.* at 42, all of which could permissibly be considered under the "modified categorical" approach described in *Taylor*. And since, on petition for review of a removal order, a court of appeals' review of the agency's decision is limited to the evidence in the administrative record, 8 U.S.C. 1252(b)(4)(A), there does not appear to be any basis for the court of

appeals to have decided the case other than in accordance with *Taylor*.

Petitioner claims that "[t]he IJ based his conclusion that [petitioner's] crime was related to a controlled substance on the fact that 'Count 3' of the Indictment—a Count for which [petitioner] was charged but *never convicted*—alleged that he was involved in drug trafficking activities." Pet. 6 (citing Pet. App. 54). The IJ's reference to "Count Three," however, was clearly a reference to the third object of the conspiracy charged in Count One, as the language immediately following the reference makes clear. Compare Pet. App. 54 (IJ decision) ("[Petitioner] was charged in Count Three of the Indictment with traveling in interstate and foreign commerce with the intent to distribute, and thereafter distributing, the proceeds of unlawful narcotics and controlled substances activities.") with Indictment 4 (Count One, Object Three) (petitioner conspired to "travel in interstate and foreign commerce * * * with intent to distribute the proceeds of an unlawful activity, namely narcotics and controlled substances"). Petitioner also claims that the magistrate judge "based [his] holding on 'other counts of the indictment,' though [petitioner] was *never convicted* of any other charges." Pet. 7 (citing Pet. App. 34). What the magistrate judge in fact said, however, is that "[t]he allegations in Count I demonstrate that the petitioner's conspiracy conviction is so closely related to the underlying drug offenses contained in the other counts of the indictment as to be a conviction 'relating to' a controlled substance." Pet. App. 33-34. Contrary to petitioner's assertion, therefore, the IJ and magistrate judge did not "determine[]"—much less "expressly determine[]"—that petitioner's "offense related to controlled substances on the basis of drug charges against

[him] that were dismissed without ever having gone to trial." Pet. 23. The IJ and magistrate judge relied only on the charge (Count One) to which petitioner pleaded guilty. Pet. App. 31-34, 54-56.

c. Contrary to petitioner's contention, there is also no basis to conclude that the agency or courts below applied *Taylor* incorrectly. See Pet. 18 ("Had [the court of appeals] applied the categorical or modified categorical approach, it could only have reached the decision that [petitioner] was not convicted of an offense relating to a controlled substance."). Petitioner pleaded guilty to Count One of the indictment. Pet. App. 14-15, 48. That count charged him and others with conspiracy to commit four offenses against the United States, one of which was "travel[ing] in interstate and foreign commerce," "us[ing] any facility in interstate and foreign commerce," and "caus[ing] such travel and use," with the "intent to distribute the proceeds of an unlawful activity, namely narcotics and controlled substances." Indictment 4. As means of accomplishing the objects of the conspiracy, Count One alleged that petitioner and others "provided a money laundering service involving currency deposits and wire transfers for major narcotics traffickers who derived large quantities of United States currency from sales of cocaine" and that petitioner personally "collected and transferred, and caused the collection and transfer, of currency" to others. *Id.* at 4-5, 7. At the plea proceeding, in response to the district court's request for a description of what the evidence would show if the case were to go to trial, the prosecutor said that "members of the conspiracy had access to large amounts of currency, which was derived from the sale of cocaine"; that petitioner "would take, deliver or transfer currency * * * to financial institutions"; that "an ille-

gal agreement" had been made with the financial institutions "to fail to file the necessary reports with the Department of Treasury"; and that petitioner "knew that the money was being transported for this purpose and knew that it was against the law." Plea Tr. 5-6. When the district court asked petitioner whether he agreed with the facts stated by the prosecutor, petitioner answered "[y]es." *Id.* at 6.

The conviction records that may permissibly be considered at the "modified categorical" step under this Court's decisions therefore establish that petitioner was convicted of violating a law "relating to a controlled substance," particularly since "[t]he phrase 'relating to' in this context has long been construed to have broad coverage." *In re Beltran*, 20 I. & N. Dec. 521, 526 (B.I.A. 1992). In any event, this Court ordinarily does not grant certiorari when the asserted error consists only of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

d. Petitioner contends (Pet. 12-18) that there is a circuit conflict on whether *Taylor*'s "categorical" approach should be employed in deciding whether an alien has been convicted of an offense "relating to a controlled substance." He contends that "[t]he Ninth Circuit applies the categorical and modified categorical approach" to that question, while "the First, Fifth, and Sixth Circuits analyze the relevant statutes and underlying facts on the basis of different criteria." Pet. 17. That is not correct. Like the decisions of the agency and courts below, the decisions on which petitioner relies (Pet. 13-16) *all* applied "the categorical and modified categorical approach." See *Medina* v. *Ashcroft*, 393 F.3d 1063, 1065-1066 (9th Cir. 2005) (explicitly applying "categorical" and "'modified' categorical" approach); *Peters* v.

*Ashcroft*, 383 F.3d 302, 306 (5th Cir. 2004) (relying on statute of conviction and judgment of conviction); *Urena-Ramirez* v. *Ashcroft*, 341 F.3d 51, 54 (1st Cir. 2003) (relying on statute of conviction and plea agreement); *Casteneda de Esper* v. *INS*, 557 F.2d 79, 80 (6th Cir. 1977) (no dispute as to offense of which alien was convicted).

Petitioner contends (Pet. 14-16) that, rather than employing *Taylor*'s "categorical" approach, the First, Fifth, and Sixth Circuits employ a "nexus" test (or something akin to one). That contention confuses apples and oranges. The "categorical" approach provides a methodology for determining the crime of which the alien was in fact convicted; the "nexus" test provides a methodology for determining whether the crime of which the alien was convicted "relat[es] to a controlled substance." Thus, in *Peters*, the Fifth Circuit first relied on the criminal statute and record of conviction to determine that the alien had been convicted of solicitation to transport marijuana for sale (383 F.3d at 306), and then it concluded that that offense "relat[es] to a controlled substance" because "there was a sufficient nexus between his solicitation conviction and drug-related laws" (*id.* at 309). Likewise, in *Urena-Ramirez*, the First Circuit first relied on the criminal statute and record of conviction to determine that the alien had been convicted of traveling in interstate commerce to promote a business enterprise involving cocaine (341 F.3d at 54), and then it concluded that that offense "relat[es] to a controlled substance" because "the Travel Act violation" was not "separate or distinct" from "the petitioner's involvement in the cocaine trade" (*ibid.*). Indeed, the Ninth Circuit employs the same two-step approach. See, *e.g.*, *Johnson* v. *INS*, 971 F.2d 340, 342-343 (1992) (rely-

ing on statute of conviction and information to determine that alien had been convicted of traveling in interstate commerce with intent to distribute narcotics proceeds and then concluding that that offense "relat[es] to a controlled substance" because it "direct[ly] involve[d] * * * a drug transaction"). Even if there *were* a circuit conflict, however, this case would not be an appropriate one for resolving it, because there is no reason to believe that the court below applied a standard other than the one that petitioner advocates. See pp. 11-14, *supra*.

e. If petitioner were correct in his contention that he was not ineligible for a discretionary waiver of inadmissibility on the ground that he had been convicted of violating a law "relating to a controlled substance," he would still be ineligible for a waiver of inadmissibility on an independent ground. A ruling in his favor would therefore have no effect on the outcome of the case.

The IJ found that, in addition to being ineligible for a waiver of inadmissibility by virtue of having been convicted of an offense "relating to a controlled substance," petitioner was ineligible for such a waiver under 8 U.S.C. 1182(a)(2)(C)(i), because the indictment and plea colloquy provided "reason to believe" that he was an "illicit trafficker in [a] controlled substance" or a co-conspirator of an "illicit trafficker." Pet. App. 56-59. Although the BIA did not reach that question, *id.* at 6-7, the magistrate judge did. He came to the same conclusion as the IJ, *id.* at 35-37, and the district court adopted his recommendation, *id.* at 8-9.

Because the court of appeals converted the habeas corpus petition into a petition for review, Pet. App. 1-4, it was reviewing the decision of the BIA rather than the district court. And because the BIA did not address the alternative ground for petitioner's ineligibility for a

waiver of inadmissibility, the court of appeals probably should be presumed not to have passed on it either. There is little doubt, however, that the IJ's finding was a permissible one, and that, particularly in light of the deferential standard of review, it would be upheld by the BIA and the court of appeals. See 8 C.F.R. 1003.1(d)(3)(i) (on appeal to the BIA, "[f]acts determined by the immigration judge * * * shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous"); 8 U.S.C. 1252(b)(4)(B) (on petition for review to the court of appeals, "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). Even if petitioner's guilty plea to Count One of the indictment did not establish that he was convicted of a crime "relating to a controlled substance," a grand jury found probable cause to believe (in Counts Two, Three, and Four) that he conspired to distribute cocaine and aided and abetted the distribution of cocaine. Indictment 19-27. In combination with petitioner's guilty plea to Count One, the grand jury's finding provided a solid basis for the IJ to find "reason to believe" that petitioner was an "illicit trafficker" in a controlled substance or a co-conspirator of an "illicit trafficker." See *Castano* v. *INS*, 956 F.2d 236, 238 (11th Cir. 1992) ("it is not necessary that an alien seeking admission have been convicted, or even arrested or investigated for drug trafficking in order to be inadmissible[;] the alien may be denied admission if officials 'know or have reason to believe' that the alien has trafficked in drugs").

2. Petitioner also urges the Court to grant certiorari to decide whether, when *Taylor*'s "categorical" approach applies, "the government's standard of proof in establishing the grounds for removability" (Pet. 21) is proof

beyond a reasonable doubt or clear and convincing evidence. Pet. 21-23. For two independent reasons, that question is not presented in this case.

First, petitioner's conspiracy conviction was not the ground for his removability, but rather a ground that rendered him ineligible for a waiver of inadmissibility. And on the question of admissibility, it is the alien, not the government, that bears the burden of proof. See 8 U.S.C. 1229a(c)(2)(A) ("the alien has the burden of establishing * * * that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under [8 U.S.C.] 1182"); 8 U.S.C. 1361 ("[w]henever any person * * * makes application for admission, * * * the burden of proof shall be upon such person to establish that he * * * is not inadmissible").

Second, the fact that *was* the ground for petitioner's removability—that he was present in the United States in violation of law by virtue of having remained in the country beyond the time authorized—was uncontested. See Pet. App. 16 (noting that petitioner "conceded his deportability"); *id.* at 43 (same); see also Pet. 5 n.3 (noting that petitioner "conceded that he was removable on the basis of his visa overstay"). The standard of proof by which the government must establish that fact, therefore, has no relevance in this case.

In any event, in light of the IJ's alternative ruling, petitioner would be removable and ineligible for a waiver of inadmissibility even if it were determined that his conspiracy conviction did not make him ineligible for a waiver. See pp. 17-18, *supra*. That is an additional reason why certiorari should be denied on this question.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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# In The
# Supreme Court of the United States

CARLOS PRADILLA,

*Petitioner,*

v.

ALBERTO GONZALES, Attorney General of the United States; MICHAEL CHERTOFF, Secretary, United States Department of Homeland Security,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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## REASONS FOR GRANTING THE PETITION

### I. As An Initial Matter, This Petition Does Not Involve Review Of The Magistrate Judge's Report And Recommendation Nor The District Judge's Order, But Solely The Decisions Of The Eleventh Circuit, Board Of Immigration Appeals ("BIA"), And To The Extent Ratified By The BIA, The Decision Of The Immigration Judge ("IJ").

In the Eleventh Circuit's decision in this case, all but two sentences dealt with the procedural posture of this case. *See* App. 1-4. No substantive analysis was provided. As the Circuit panel properly held, the REAL ID Act, Pub.L. No. 109-13, 119 Stat. 311 (2005), converted the Petitioner's habeas claim into a petition for review. *Id.* The decision of the United States District Court (App. 8-9) and the Report and Recommendation of the Magistrate Judge (App. 10-40), therefore, have *no legal effect* and must be wholly disregarded; *the Eleventh Circuit only stood in review of the decision of the BIA. See Hernandez v. Gonzalez*, 437 F.3d 341, 344 (3d Cir. 2006) ("[W]e are obliged to vacate the District Court's opinion and address the claims raised ... as if ... presented before us in the first instance as a petition for review"); *see also Ramirez-Molina v. Ziglar*, 436 F.3d 508, 511-12 (5th Cir. 2006). To the extent that the BIA relied on the decision of the Immigration Judge (IJ), then the decision of the IJ would also be relevant.[1]

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[1] The Circuit Court of Appeals typically stands in review of the BIA's decision, since it is the highest administrative tribunal. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001). However, when the BIA expressly adopts the Immigration Judge's opinion and reasoning, the courts review the Immigration Judge's decision, not the BIA's. *Savoury v. U.S.Att'y Gen.*, 2006 WL 1426950 (11th Cir. 2006); *Al Najjar*, 257 F.3d at 1284; *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 817-18 (11th Cir. 2004). To the degree that the BIA adopts the Immigration Judge's decision, the BIA "must be charged with whatever flaws or inadequacies" that the reviewing court discerns. *Angoucheva v. INS*, 106 F.3d 781, 789 (7th Cir. 1997). The BIA may expressly adopt the Immigration Judge's opinion by issuing an affirmance without opinion, or by issuing a brief *per curiam* opinion. *See Gandarillas-Zambrana v. BIA*, 44 F.3d 1251, 1255 (4th Cir. 1995); *Panrit v. INS*, 19 F.3d 544, 546 (10th Cir. 1994).

(Continued on following page)

The Solicitor General's Brief for the Respondents in Opposition ("Resp.") concedes these points at pp. 17-18, but nonetheless proceeds to make *seven* (7) *references* to the United States Magistrate Judge's decision in the course of an eleven-page argument, in an attempt to shore up weak legal and factual foundations, as noted in the various instances discussed below. *See* Resp. at 12-14, 17.

## II. Under This Court's Precedents, The Use Of The Categorical And Modified Categorical Approach Is *Required* In Determining The Legal Effect Of A Conviction For Immigration Purposes.

A. The government's response argues that the use of the categorical and modified categorical approaches was not required in the instant case. The government contends that "there is reason to question whether [the] categorical approach [set forth in *Taylor v. United States*, 495 U.S. 575 (1990)] must be applied, at least in the same way, in the deportation context," given that *Taylor* was a criminal case. *See* Resp., at 10-11. This ignores the controlling Supreme Court precedent in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (using the categorical approach to assess whether a conviction was a "crime of violence" for immigration-law purposes) and *Gonzalez v. Duenas-Alvarez*, 127 S.Ct. 815, 818-19 (2007) (using the categorical approach to assess whether a conviction for aiding and abetting theft was a "theft" crime for immigration-law purposes, and confirming the validity of the modified categorical approach as well); *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). The government's response cites no Supreme Court decisions and/or dicta that would suggest

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In the instant case, the BIA issued its own opinion, but on the critical question herein – whether the Petitioner's offense related to a controlled substance – the BIA's total treatment amounted to three sentences. The first sentence raised the issue, the second confirmed the BIA's agreement with the Immigration Judge ***without any explanation whatsoever***, and the third cited the fifty-year-old case that the Judge had relied upon. App. 6-7. On these facts, this Court must look to the Immigration Judge's decision as supplying the reasoning behind the BIA's decision.

that the categorical and modified categorical approaches do not apply in immigration cases or are differently applied in those cases as opposed to criminal ones.

B. The government further argues that the two approaches need not have been used in the instant case because, as a procedural matter, the question decided by the BIA was the Petitioner's eligibility for relief from removal, as opposed to the grounds of removability itself. *See* Resp., at 11, 19; Pet. Brief, at 5-6 n.3. That is, the government argues that the categorical and modified categorical approaches must be used by the Immigration Court in determining whether a conviction "relates to a controlled substance" if the conviction is the basis for removal, but not on the *same question* if the conviction is the basis for denying the alien the right to seek relief from removal.

*This is a distinction without a difference.* The policy reasons for utilizing the categorical and modified categorical approaches, summarized in Petitioner's Brief, at 11-12, are no less compelling if the question (of whether a conviction relates to a controlled substance) arises at one stage of the immigration proceedings versus another. The policy aims – precluding the immigration court from retrying the criminal case, grappling with what type of evidence to admit, arriving at results inconsistent with other courts, *Shephard v. United States*, 544 U.S. 13, 19-20 (2005); *Taylor*, 495 U.S. at 601-02 – are just as strong when the immigration judge decides whether the given offense renders the alien removable or ineligible for relief from removal.[2] *See also I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104

[2] The government's logic could lead to absurd results. For instance, assume that the Department of Homeland Security (the "DHS") had not dismissed the charge against the Petitioner that he was removable for having committed a crime relating to a controlled substance. The immigration court would have used the categorical and modified categorical approaches to assess whether that charge was valid, and as shown in Petitioner's Initial Brief, could only have arrived at the conclusion that the conviction was *not* a crime relating to a controlled substance. But the Petitioner would still have been removable as an overstay, and would have sought to adjust his status. The same question as before – was his offense related to a controlled substance – would thus arise again. According to the government, the immigration court would *not* have to apply the categorical and modified categorical approach at this point, in determining eligibility for relief, though

(Continued on following page)

S.Ct. 3479 (1984) (stating that, "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country. . . . The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime. . . ."). The Respondent's brief fails to devote a single word to the policy reasons underlying the categorical and modified categorical approaches, because these reasons run contrary to its arguments and to the decisions below under review in the instant case.[3]

## III. The Solicitor's Contention That The Eleventh Circuit Followed The Categorical Or Modified Categorical Approach Because It Reviewed Certain Documents Improperly Describes The Approach

### A. The Modified Categorical Approach Is Not Only A Review Of Documents But A Limitation On The Documents Which The Immigration Court May Examine, And The Eleventh Circuit Necessarily Strayed Beyond Those Limits In Upholding The IJ/BIA's Decision

It is beyond doubt that in applying the modified categorical approach, the list of documents set forth in *Shephard*, 544

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the question is exactly the same. The immigration court could look at the underlying facts, forcing the parties to relitigate the criminal matter virtually in full. While in this case the results would presumably be the same, it is easy to envision cases in which facts outside the record would lead to a different result if the categorical and modified categorical approaches were not used.

[3] The government argues, in effect, that the categorical approach applies only to determine grounds of removability and does not apply with respect to determine grounds of inadmissibility regarding an aliens' eligibility for waivers. Resp. at 18-19. In fact, the BIA has clearly held in numerous cases that the categorical approach applies in all cases to determine whether a crime, for example, can be classified as an aggravated felony, *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999), as a crime involving moral turpitude, *Matter of Short*, 20 I&N Dec. 136 (BIA 1989), a firearms conviction, *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996), or a controlled substance offense, *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979). There is no authority for the proposition, as Respondent urges that the categorical approach is inapplicable to determine grounds of inadmissibility for purposes of determining an alien's eligibility for a waiver.

U.S. at 26, and its progeny is an ***exclusive*** list – i.e., not a mere starting point for the Immigration Court's inquiry. *See also Gonzalez v. Duenas-Alvarez*, 127 S.Ct. 815, 819 (2007); *Medina v. Ashcroft*, 393 F.3d 1063, 1066-67 (9th Cir. 2005); *Chang v. INS*, 307 F.3d 1185, 1189-90, 1191-92 (9th Cir. 2002) (reversing because the Immigration Court relied on the presentence report, even though it conflicted with the permitted documents); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc) (also reversing because of the Immigration Court's reliance on information in the presentence report whose source was unclear). The court may only examine the charging document, plea agreement, the transcript of the plea colloquy, or "some comparable judicial record" of information about the "factual basis for the plea," but nothing beyond such documents. *Shephard*, 544 U.S. at 26.

It is also beyond doubt that such documents are only relevant with respect to the crime(s) for which the alien was *convicted*. Time and again, the circuit courts of appeals have emphasized that in determining whether a conviction fits a given immigration law category and therefore justifies removal, ***the court may look only at convictions, and not to charges which were dismissed.*** *See, e.g., Alaka v. U.S. Attorney General*, 456 F.3d 88, 106-09 (3rd Cir. 2006) (holding that the Immigration Court erred in relying upon dismissed charges in determining that the alien's fraud offense caused more than $10,000 in losses, or that it was a "serious offense"; regarding the former, the plea agreement controls, not the indictment); *Chang*, 307 F.3d at 1190-91 (similarly holding that the Immigration Court erred in relying upon dismissed charges in determining that the alien's fraud offense caused more than $10,000 in losses; the INA requirements of a conviction and losses over $10,000 could not be separated from each other, such that the latter could be proved by dismissed counts); *Yousefi v. I.N.S.*, 260 F.3d 318, 329-30 (4th Cir. 2001) (reversing the Immigration Court and stating that, "[w]e can find no authority for the proposition that dismissed counts . . . may be considered in determining whether a specific crime is a particularly serious one"); *Conteh v. Gonzales*, 461 F.3d 45, 56 (1st Cir. 2006) (stating that "the BIA . . . must base removal orders on *convictions*, not on conduct alone").

### B. The IJ Did Not Follow The Modified Categorical Approach

In short, if an immigration judge looks beyond the convictions to information regarding ***dismissed*** counts, then that is a misapplication of the categorical and modified categorical approaches. That is precisely what occurred in the instant case. The court below misapplied the modified categorical approach, in that it based its conclusion on a count on which the Petitioner was never convicted. The immigration judge explicitly pointed to "Count Three of the Indictment" – in which the Petitioner was charged with conspiracy to possess narcotics – as proving that his conviction on Count One related to a controlled substance, but the judge himself recognized that the Petitioner was never convicted of Count Three. *See* Petitioner's Brief, at 6; App. 54-56.

Respondent asks this Court to ***reinvent*** the Immigration Judge's (IJ's) order and to assume that when the IJ wrote, "Count Three," the court below really meant, "part three of Count One." *See* Resp., at 13-14. As Respondent itself noted in its brief, the Court's "review of the agency's decision is limited to the evidence in the administrative record, 8 U.S.C. § 1252(b)(4)(A)." Resp., at 12. As such, this Court reviews the record (including the immigration judge's opinion) ***as written***, not as the government ***wishes*** it were written: i.e., "count Three" must mean Count Three and not some other count. To hold otherwise would be to rewrite opinions based on their inferences and guesses as to what was purportedly intended by the courts below in contravention of the clear language utilized. *See, e.g., Bruner v. U.S.*, 343 U.S. 112, 116 (1952) ("[W]e may not speculate on probabilities of intention" in the context of statutory interpretation) (internal quotes omitted); *U.S. Postal Service v. Gregory*, 534 U.S. 1, 7 (2001) ("It is not for the Federal Circuit to substitute its own judgment for that of the Board").

Moreover, the government pushes for this suggestion based on how the immigration judge described the relevant count that he was taking into consideration. Respondent neglects to mention that the judge described the relevant count in different ways at different times. At one point, the court states that the Petitioner was "charged with, but not specifically convicted of,

violations involving the transportation of narcotic drugs into the United States." App. 55. This is not a precise reference to either Count Three (conspiracy to possess cocaine with the intent to distribute) or part three of Count One (conspiracy to travel in interstate commerce with the intent to distribute the proceeds of unlawful narcotic sales), but surely more closely resembles the former, in that it deals with obtaining drugs, not distributing the financial proceeds thereof.[4]

## IV. The "Reason To Believe" Ground Of Inadmissibility Was Never Reached By The BIA (Nor By The Eleventh Circuit Below), And, Therefore, Is Not Properly Before This Court

The government in response alternatively maintains that Mr. Pradilla was ineligible for the waiver of his criminal conviction under 8 U.S.C. § 1182(h) because there was a "reason to believe" he was an "illicit trafficker in [a] controlled substance" or co-conspirator of an "illicit trafficker." *See* Resp., at 17 (citing 8 U.S.C. § 1182(a)(2)(C)(i)). The government then admits, however, that the BIA never even reached this issue, but that "the magistrate judge did ... and the district court adopted his recommendation." *Id.*

The government, after admitting that the BIA (and by extension the Eleventh Circuit) never reached this issue, impermissibly has relied on the Magistrate Judge's report and District Court's decision to find that they "came to the same

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[4] In fact, regardless of whether the Immigration Judge meant Count Three or part three of Count One, the record shows that the Petitioner was not convicted of either. The judgment clearly indicates that Count Three was dismissed. As to Count One, the Petitioner was convicted of *part one* of that count (knowingly causing a financial institution to fail to file a currency transaction report for a deposit over $10,000), *not part three of that count*. *See* Plea Colloquy Transcript, quoted in Petitioner's Initial Brief at 19-20; *see also* the Indictment, District Court Docket Entry 5, at 7-19 (where the Petitioner is only listed in two of the 93 "Overt Acts" and his two acts only mention currency, whereas many of the acts mentioning other persons specifically referenced narcotics). Nothing in the documents permitted for review under the modified categorical approach prove or even suggest that the Petitioner's crime was, to his knowledge, related to a controlled substance.

conclusion as the IJ." *Id.* As mentioned, the Magistrate Judge's report and District Judge's decision have *no legal effect* and must be wholly disregarded as the *Eleventh Circuit only stood in review of the decision of the BIA*. Since the BIA did *not* consider the "reason to believe" ground of inadmissibility, as conceded by the Government, *id.* at 17, it is not a proper issue before this Court.

## V. There Is A Split In The Circuits As Shown By The Lower Courts' Application Of (And Failure To Apply) The Categorical And Modified Categorical Approach

### A. The Cases Relied Upon By Respondent Are In No Way Indicative Of A Two-Step Approach

The split in the circuits is clear: while some circuits simply apply a nexus test, others apply the categorical or modified categorical approach. Respondent's reading of the cases discussed in Petitioner's initial brief ignores the fact that the First Circuit, Fifth Circuit, as well as Sixth Circuit, is in direct conflict with the Ninth Circuit in its application of the categorical approach. *See* Pet. Brief, at 12-23. *Compare Urena-Ramirez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003), *Peters v. Ashcroft*, 383 F.3d 302 (5th Cir. 2004), and *Castaneda v. INS*, 557 F.2d 79 (6th Cir. 1977), with *Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).[5]

From a close reading of the cases cited by Respondent, *see* Resp., at 16-17, it is apparent that, despite the government's assertion to the contrary, these courts did *not* engage in a two-step approach, i.e., first applying the categorical approach and then a nexus test. There is no question that no mention is made in these cases of *Taylor*, the categorical approach, or

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[5] Petitioner has not confused "apples and oranges" because while the First, Fifth, and Sixth Circuits employ a "nexus" test, other circuits employ some version of the categorical or modified categorical approach under *Taylor* to determine whether a criminal conviction is "related to a controlled substance" offense.

even the modified categorical approach.[6] Instead, only some version of a nexus test was applied. In *Peters*, for example, the Fifth Circuit explicitly voiced its disagreement with the approach used by the Ninth Circuit: "We disagree with the Ninth Circuit's conclusion [in *Londono-Gomez v. INS*, 699 F.2d 475 (9th Cir. 1983)] that no such nexus can be found in an Arizona solicitation conviction." *Peters*, 383 F.3d at 307. Clearly, the Fifth Circuit has expressed discord with the Ninth Circuit in terms of the exact type of test to be applied in determining the very issue before this Court: whether a given conviction can be considered "related to a controlled substance" under the immigration laws.

Similarly, in *Urena-Ramirez*, *see* Resp. at 16, there was no mention of the categorical approach, and absolutely no mention that the IJ was limited in what documents it could review under *Taylor*. Rather, the court simply noted that the IJ relied on "the record of the petitioner's conviction, including the plea agreement" and found that the petitioner's Travel Act conviction "constituted both a drug-related offense and an aggravated felony." *Urena-Ramirez*, 341 F.3d at 53. No further mention was made of what documents the IJ or BIA could or did examine.

Respondent, therefore, incorrectly describes *Peters*, *Urena-Ramirez*, as well as, *Johnson v. INS*, 971 F.2d 340 (1992), as employing a "two-step approach," ***when no such approach was employed.*** A glaring example of Respondent's misapprehension is *Johnson*, where the court expressly noted in the course of its decision that it had utilized the alien's "Petition to Enter a Plea of Guilty," which was ***not*** one of the documents allowed under the categorical approach as formulated in *Taylor* and *Shephard*. *See Johnson*, 971 F.2d at 343 (noting that in the Petition to Enter Plea of Guilty, Johnson stated: "*I believed* that my boyfriend was going to use [a hidden compartment in a car] to put money in it from narcotics."). Such use of a document ***outside the record of conviction*** is expressly not allowed

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[6] Indeed, there is no way to tell, in the cases cited by Respondent, *see, e.g.*, *Peters* and *Urena-Ramirez*, whether the IJ or BIA below went outside the record of conviction and looked at impermissible facts in contravention of *Taylor*, since *Taylor* was not applied.

under the categorical or modified categorical approach. *See Taylor*, 495 U.S. at 602 (holding that sentencing court may look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.").

There is no question that the controlling Supreme Court precedents, in *Leocal*, *Lopez*, *Shephard*, and *Taylor*, do ***not*** allow for the lower courts to transform the "categorical" approach into a simple "nexus" test. Nor was it proper for the Eleventh Circuit in the present case to affirm the rulings of the BIA and IJ, which were in contravention of *Taylor* and this Court's other precedent decisions.[7]

## CONCLUSION

For the reasons stated in the original Petition and this Reply, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[7] Respondent finally argues, *see* Resp. at 17, *that even if there were a circuit conflict*, the present case is not an appropriate one "for resolving it" because, according to Respondent, "there is no reason to believe that the court below applied a standard other than the one the petitioner advocates." *Id. However, this is simply not the case.* There is every reason to believe the Eleventh Circuit failed to apply the categorical approach below because to find that Mr. Pradilla was convicted of a crime relating to a controlled substance, the court necessarily had to go outside the record of conviction and consider counts for which he was not convicted. The Petitioner was only convicted of a money laundering offense, Count I (knowingly causing a financial institution to fail to file a currency transaction report for a deposit over $10,000), and there was no offense for which he was actually convicted that contained any reference to a controlled substance.